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IN THE

Supreme Court of the United States

October Term, 1986

NEW YORK LAND COMPANY, JOSEPH BERNSTEIN, RALPH BERNSTEIN, CANADIAN LAND COMPANY OF AMERICA, N.V., HERALD CENTER LTD., and NYLAND (CF8) LTD.,

Petitioners,

—against—

THE REPUBLIC OF THE PHILIPPINES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PHILIP R. CARTER
BERNSTEIN CARTER & DEYO
29 West 57th Street
New York, New York 10019
(212) 752-9444
Counsel for Petitioners Canadian Land Company of America N.V., Herald Center Ltd., and NYLand (CF8) Ltd.

MICHAEL J. SILVERBERG
(Counsel of Record)
Lawrence M. Sands
PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON
40 West 57th Street
New York, New York 10019
(212) 977-9700
Counsel for Petitioners New York Land Company, Joseph Bernstein and Ralph Bernstein

Questions Presented

Upon the overthrow of Ferdinand Marcos as president of the Philippines, the new government issued Executive Orders confiscating his property and commenced action in New York, in aid of its decrees, to "freeze" all properties allegedly controlled by him in that State. The complaint charged Marcos with illegally misappropriating government funds during twenty years as President and alleged that some of those funds had been invested in properties in New York. The District Court granted a preliminary injunction despite respondent's failure to demonstrate the probable success of its claims, based upon a "balance of hardships" test and a finding of "serious questions going to the merits" as to Marcos' ownership and his alleged illegal acts. The "freeze" was granted for an indefinite period pending the promised eventual adjudication of respondent's claims in the courts of the Philippines although no such action in the Philippines had been commenced.

Petitioners are the owners and managers of three New York City properties valued at an aggregate of more than $200,000,000 which are subject to the "freeze." The properties are owned by offshore corporations whose stock is held by Panamanian corporations. Petitioners Bernstein and New York Land Company negotiated in July 1985 an arm's length purchase of all of the capital stock of the corporations which own the properties and claim ownership of said stock, but delivery of the shares has been prevented by the restraining orders and preliminary injunction issued below. Those orders have now been in force for almost one year despite respondent's continued failure to demonstrate the probable success of its claims. The buildings have now fallen into default and are faced with foreclosure, receivership and leasehold forfeiture proceedings as a result of the inability to complete the trans-

fers of these properties or to finance them due to the continuing injunction.

The following substantial federal and constitutional issues are raised, for which petitioners seek this Court's review:

(1) Whether a foreign government may freeze United States property by court order for an indefinite period, in aid of a foreign confiscation decree, pending the foreign government's determination of its unproven claims in its own courts?

(2) Whether such an indefinite "freeze" of property violates the Due Process rights of petitioners?

(3) Whether the District Court had authority, in the face of New York and federal law prohibiting attachment of the property, to grant equivalent relief by injunction?

(4) Whether jurisdiction existed to entertain this action in the Southern District of New York based on completely foreign claims?

(5) Whether the action is consistent with traditional principles (the "Act of State" doctrine) whereby the United States courts have declined to hear or determine the claimed illegality of acts of foreign officials or to enforce "penal laws" of a foreign country?

(6) Whether the lower courts properly failed to dismiss the action on grounds of *forum non conveniens?*

(7) Whether the action is barred by principles of sovereign and executive immunity under United States and Philippine law?

(8) Whether the action should have been dismissed for failure to state a valid or justiciable claim or to establish the inadequacy of respondent's remedy at law?

Petitioners believe that serious questions of federal and constitutional law are raised as to each of the above issues, and by the inconsistency of the lower courts' decisions with prior law, including this Court's decisions, the decisions of New York's highest courts and the prior decisions of the Second Circuit itself. The broad implications of this precedent, the urgency of petitioners' need for appellate relief and the public significance of the issues merit this Court's review.

Parties to the Proceedings

Petitioners are defendants New York Land Company, Joseph Bernstein, Ralph Bernstein, the Canadian Land Company of America, N.V., Herald Center Ltd. and NYLand (CF8) Ltd.

Respondent is The Republic of the Philippines.

In addition to the petitioners, defendants in this action are Ferdinand E. Marcos, Imelda Marcos, Gliceria Tantoco, Vilma Bautista, Antonio Florendo, Paul A. Crotty, as Commissioner of Finance of the City of New York, Department of Finance of the City of New York, City Register's Office of the City of New York, John Kinsella, County Clerk, Suffolk County, Glockhurst Corp., N.V., Realmad Properties Ltd., Briwater Associates, and Ancor Holdings N.V.

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Petitioners,

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THE REPUBLIC OF THE PHILIPPINES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit entered in these proceedings on November 26, 1986, which affirmed an order of preliminary injunction granted by the United States District Court, Southern District of New York (Pierre N. Leval, J.) on May 2 (as amended May 5), 1986.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 860 F.2d 344 and is set forth in Appendix A hereto. The opinion and order of the District Court granting the preliminary injunction is reported at 634 F. Supp. 279 and appears as Appendix B

hereto. Certain subsequent opinions issued by the District Court appear as Appendices C and D hereto.

Jurisdiction

The decision of the United States District Court, issuing the preliminary injunction, was an appealable interlocutory decision pursuant to 28 U.S.C. § 1292. The Second Circuit, on appeal, affirmed. Jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property without due process of law. . . .

Certain provisions of the Federal Rules of Civil Procedure and New York's Civil Practice law and Rules are reprinted in Appendix E.

Statement of the Case

Petitioners are the owners and managing agents of three New York properties affected by an order of preliminary injunction granted May 2, 1986 (as amended May 5, 1986) by the United States District Court for the Southern District of New York.

The three properties involved in this petition (the "Properties") are the "Crown Building" (which is owned by petitioner Canadian Land Company of America N.V.), "Herald Center" (the leasehold to which is owned by petitioner Herald Center Ltd.), and 40 Wall Street (the leasehold to which is owned by petitioner NYLand (CF8) Ltd.).

Petitioners Canadian Land Company of America, N.V. and NYLand (CF8) Ltd. are Netherlands Antilles corporations. Petitioner Herald Center, Ltd. is a British Virgin Islands corporation. The stock of each of the three corporations (the "Owner Corporations") is held by three Panamanian corporations.*

Petitioner New York Land Company (the business name of NYL Inc., a New York corporation) is owned by Petitioners Joseph and Ralph Bernstein and is the managing agent of the three Properties.** Petitioners Bernstein and New York Land Company had negotiated the purchase of the stock of the Owner Corporations in July 1985 with representatives of the Panamanian corporations and their counsel before this action was brought and claim ownership rights to said shares although actual delivery has been restrained.

Facts.

On February 25, 1986 Ferdinand Marcos was ousted as President of the Republic of the Philippines. Corazon

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* The outstanding capital stock of Canadian Land Company of America, N.V. is held by Trade & Commodities, S.A., Yewell Compagnie Immobiliere, S.A., and Paneles Porcelanizados, S.A., which are all Panamanian corporations. The outstanding capital stock of NYLand (CF8) Ltd. is held by Beneficio Investment, Inc., Bueno Total Investment, Inc., and Excellencia Investment, Inc., which are all Panamanian corporations. The outstanding stock of Herald Center, Ltd. is held by Bedner Development Corporation, Dicet Finance and Investment Corp., and Comapral Investment, S.A., which are all Panamanian corporations.

** Affiliates of The New York Land Company, all wholly owned by Joseph Bernstein and Ralph Bernstein, are The New York Holding Company, Inc. (a Delaware corporation), NYL Properties, Inc. (a Delaware corporation), New York Land International Ltd. (a Delaware corporation), NYL Development Corporation (a New York corporation), NYL Construction Corporation (a New York corporation), Manhattan Land Company, Inc. (a New York corporation), The New York Music Company, Inc. (a New York corporation), and New York Realty, Inc. (a Delaware corporation).

Aquino assumed the presidency, declared the Philippine parliamentary body dissolved, and issued two Executive Orders accusing President Marcos of "purloining" funds belonging to the Government and people of the Philippines. The Orders directed the seizure of his assets in the Philippines and abroad, appointed a "Commission on Good Government" to effectuate the seizure and called on foreign governments to "freeze" all such property pending proceedings in the Philippines to determine whether they had been acquired by the illegal use of government funds.*

This action was instituted by respondent in the Supreme Court of the State of New York, County of New York, on March 2, 1986 for an injunction to "freeze" the instant Properties and other New York real estate allegedly owned beneficially by Marcos pending an eventual adjudication in the Philippines of respondent's claims against him. The

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* Executive Order No. 1, dated February 28, 1986, charged the Commission with "The recovery of all ill-gotten wealth accumulated by former President Ferdinand E. Marcos, his immediate family, relatives, subordinates and close associates, whether located in the Philippines or abroad, including the takeover or sequestration of all business enterprises and entities controlled by them . . . ", with power "[t]o provisionally take over in the public interest or to prevent its disposal or dissipation, business enterprises and properties taken over by the government of the Marcos administration or by persons or entities close to former President Marcos . . . "

Executive Order No. 2, dated March 12, 1986, declared that the new President did thereby "(1) Freeze all assets and properties in the Philippines in which former President Marcos and/or his wife, Mrs. Imelda Romualdez Marcos, their close relatives, subordinates, business associates, dummies, agents or nominees have any interest or participation", prohibited transfer or encumbrance of such properties "in the Phillipines and abroad" and authorized the Commission on Good Government "to request and appeal to foreign countries wherein any such assets or properties may be found to freeze them and otherwise prevent their transfer, conveyance, encumbrance, concealment or liquidation . . . pending the outcome of appropriate proceedings in the Philippines to determine whether such assets or properties were acquired by such persons through improper or illegal use of funds belonging to the Government of the Philippines . . . "

State Court granted an *ex parte* temporary restraining order on March 2, 1986 restraining all transfers and encumbrances of the properties. Petitioners filed a motion to dismiss the action and while that motion was pending, removed the action on March 18, 1986 to the United States District Court for the Southern District of New York on grounds of federal question jurisdiction, 28 U.S.C. § 1331.

The Complaint.

The complaint alleges that defendant Marcos was the Philippine head of state from 1966 until February 25, 1986 (par. 3). It accuses him during that 20-year period of "widespread purloining of funds and properties which were and are the property of the Filippino government and people" (par. 4). The complaint does not particularize any alleged wrongful act or loss by the Philippine government but asks the New York courts to freeze all Marcos assets in New York, alleged to include the Crown Building, Herald Center and 40 Wall Street (par. 7) until such time as "such claims as are believed to have merit" (par. 14) are presented to and adjudicated by tribunals in the Philippines; and then to dispose of the property in such manner as Philippine tribunals may direct.

Proceedings Below.

After removal on March 18, 1986 to the U.S. District Court for the Southern District of New York, the District Court extended the State Court temporary restraining order, without bond, and ordered expedited discovery in aid of respondent's application for a preliminary injunction.

Petitioners initially consented to the extension of the restraining order for limited periods. Petitioners maintained, however, their objections to the action and to the absence of any bond. On April 15, 1986 petitioners notified the District Court of the withdrawal of their consent to

any further continuance of the restraining order as of April 21, 1986, when it was then due to expire. Petitioners simultaneously requested that a schedule be fixed for deciding the preliminary injunction motion and petitioners' cross-motion to dismiss the complaint. The Court stated, however, at a hearing held on April 18, 1986, that it contemplated further extending the temporary restraining order while plaintiff conducted further discovery in "stages". Petitioners therefore moved on April 21, 1986, to dissolve the restraining order and for a protective order terminating discovery in aid of the preliminary injunction motion, on the ground that the permissible duration of a temporary restraining order had expired, and that the court lacked authority under Federal Rule 64 to further extend the preliminary injunction proceedings or the temporary restraining order without consent.* The *ex parte* temporary restraining order had then been in effect for a total of 50 days, without bond. Respondent, however, requested an adjournment of petitioners' motion, which was granted for an additional week, and the District Court again extended the temporary restraining order without bond over petitioners' objection.

The court heard argument on the motion to dissolve the temporary restraining order on April 28, 1986. Approximately one hour prior to the hearing, respondent served motion papers, affidavits and documents asking the Court to determine the motion for a preliminary injunction, and served additional supporting documents at the hearing itself. Petitioners had no opportunity to read or respond to those papers. Four days later, on May 2, 1986, the District Court issued its preliminary injunction and ordered a $3,000,000 bond.

Petitioners thereupon appealed to the Court of Appeals for the Second Circuit from the order granting the pre-

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* *Granny Goose Foods* v. *Teamsters*, 415 U.S. 423 (1974); *Pan American World Airways Inc.* v. *Flight Engineers*, 306 F.2d 840 (2d Cir. 1962).

liminary injunction and also from the inadequacy of the $3,000,000 bond to protect petitioners' properties and other properties valued at an aggregate of approximately $300,000,000. The Second Circuit granted petitioners' motion for an expedited appeal on May 6, 1986.

The Court of Appeals heard oral argument on June 11, 1986. After deliberating for five and one-half months, the Court, on November 26, 1986, unanimously affirmed the decision of the District Court.

The Decisions Below

In granting a preliminary injunction, the District Court did not make findings of fact and recognized that defendants had not presented evidence establishing likelihood of success on the merits. The Court held, however, that pursuant to the Second Circuit's *"Jackson Dairy"* standard,* respondent was entitled to a preliminary injunction if it could show "(a) irreparable harm, and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief".

The District Court found that there was evidence suggesting Marcos ownership of the properties, and evidence that "gives support to the contention . . . that Ferdinand and Imelda Marcos misappropriated funds of the Republic, and that they have used such misappropriated funds in connection with the New York properties". (Appendix B hereto, p. 14).

The Court "recognize[d] that the evidence on which this Opinion relies is susceptible of other conceivable interpretations perhaps wholly consistent with innocent explanations" and that "this opinion does not conclude that any facts have been established," but concluded that there

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* *Jackson Dairy, Inc.* v. *H.P. Hood & Sons, Inc.*, 596 F.2d 70 (2d Cir. 1979).

was a sufficient showing of "serious questions going to the merits" and of a balance of hardships tipping toward respondent to satisfy the *Jackson Dairy* standard.* (Appendix B at p. 23).

The District Court did not expressly pass upon petitioners' motion to dismiss. Inexplicably, the Court wrote in a subsequent opinion (Appendix D hereto, p. 5) that petitioners had not made any motion to dismiss on the basis of the defenses and objections asserted by petitioners, such as lack of jurisdiction and *forum non conveniens.* In fact, however, as noted above, petitioners did file a motion to dismiss in the State Court, which was pending before the District Court and expressly called to its attention by petitioners in their motion to dissolve the restraints, based on "(a) lack of jurisdiction of the persons of said defendants; (b) lack of valid service of process; (c) lack of jurisdiction of the subject matter of this action, and *forum non conveniens;* (d) lack of standing and of legal capacity of the plaintiff to bring this action; (e) statute of limitations; (f) failure to join necessary parties; (g) failure to state a cause of action; (h) failure to separately state and number causes of action; and (i) that documentary evidence establishes a defense to said action." In addition, the petition for removal cited petitioners' objections on grounds, among others, of act of state, sovereign immunity, and deprivation of property without due process

* The Court also stated that "negative inferences" should be drawn against petitioners on the ground that by moving for a protective order terminating the preliminary injunction proceeding after 50 days, and by suspending a deposition pending the Court's ruling on the motion, petitioners had been guilty of "obstructive conduct". The Court of Appeals referred to a "lack of co-operation" but did not express agreement that petitioners had been "obstructive" and did not rely upon any negative inference. The Second Circuit has previously held that a party who appears for deposition and thereafter moves for a protective order is not subject to sanctions for waiting to proceed pending a ruling on the motion. *Israel Aircraft Industries, Ltd.* v. *Standard Precision*, 559 F.2d 203, 208 (2d Cir. 1977); *SEC* v. *Research Automation Corp.*, 521 F.2d 585, 589 (2d Cir. 1975).

of law pursuant to the Fifth and Fourteenth Amendments of the United States Constitution as well as the prohibitions contained in Article I.

In affirming, the Second Circuit Court of Appeals agreed that the *Jackson Dairy* standard had been met. The Court of Appeals held that the District Court had properly rejected, as premature, petitioners' objections based upon the Act of State Doctrine and principles of *forum non conveniens*. Other objections stated in petitioners' motion to dismiss the complaint were not treated or were also rejected.

REASONS FOR GRANTING THE WRIT

POINT I

The District Court's Indefinite "Freeze" of Defendants' Properties in Aid of a Foreign Decree Is an Unconstitutional Taking in Violation of the Due Process Rights of Petitioners.

In *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), this Court held that a pre-judgment judicial seizure of a defendant's property prior to proof of the plaintiff's claims is an unconstitutional deprivation of property in violation of Fifth Amendment Due Process rights, unless the plaintiff establishes the "validity or probable validity" of its underlying claim. This Court held it irrelevant in *Fuentes* v. *Shevin*, that a freeze is only temporary, stating that "it is now well settled that a temporary nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment." (407 U.S. at 84) This Court stated that "the Fourteenth Amendment draws no bright lines around 3-day, 10-day or 50-day deprivations of property" (407 U.S. at 86-7) and held that a claimant attempting to seize property prior to judgment must demonstrate "the validity or at least the probable validity of the underlying claims *before* [the defendant] can be deprived of his prop-

erty" (407 U.S. at 97) (emphasis added). Furthermore, this Court specifically added: *"no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of due process has already occurred."* (*Id.* at 83) (emphasis supplied)

This Court has applied the same principle in a series of related cases. *See, e.g., Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969) (wage garnishment); *North Georgia Finishing Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975) (garnishment of bank account).

In the present case, the Court of Appeals (which did not cite or discuss *Fuentes* and its progeny, despite petitioners' particular focus on them at oral argument), held that "here no confiscation has occurred" on the ground that the Executive Orders provided for a later judicial determination in the Philippines and that "the contention that a future adjudication in the Philippines will not comport with due process is not ripe." (Appendix A at p. 35). Such a view, however, is inconsistent with this Court's express ruling in *Fuentes* that "no later hearing can undo the fact that the arbitrary taking that was subject to the right of due process has already occurred." 407 U.S. at 83.

In *Republic of Iraq* v. *First National City Bank*, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966), the Republic of Iraq brought suit in the Southern District of New York to recover alleged New York assets of deposed King Faisal II asserting (as respondent does here) that "it is well known that the Iraqui Ex-dynasty has exerted its influence in Iraq to gain illegal wealth since its inception as from 23rd August 1921." The action was brought pursuant to "Ordinance No. 23" of the new Iraqui government directing that "all property [of the dynasty] . . . should be confiscated." (353 F.2d at 49). The Second Circuit refused in the *Iraq* case to enforce the foreign decree against property in New York and dismissed the action. The Court (in an opinion by Friendly, J.) held:

> Confiscation of the assets of a corporation has been said to be "contrary to our public policy and shocking to our sense of justice," [citations omitted]. Confiscation of the assets of an individual is no less so, even if he wears a crown. [citation omitted.] Our constitution sets itself against confiscations such as that decreed by Ordinance No. 23 not only by the general guarantees of due process in the Fifth and Fourteenth Amendments but by the specific prohibitions of bills of attainder in Article I. . . .

In justification of its opposite conclusion in the present case, the Court of Appeals read *Iraq* as holding that "a confiscation decree will be given consideration only if the decree is consistent with our policy and laws" (Appendix A at p. 35) (citing 353 F.2d at 51) and suggested that the instant decree presented no inconsistency with United States policy. Judge Friendly actually wrote in the *Iraq* case, however, that

> [T]he policy of the United States is that *there is no such thing as a "good" confiscation by legislative or executive decree.* (Emphasis added.)

The Executive Orders issued by respondent in the present case, are not fairly distinguishable from those considered in *Iraq*. They are plainly confiscatory, even if "temporary", and are clearly contrary to our Constitution and laws. Even though the Philippine Executive Orders purport to establish a procedure for an ultimate judicial determination abroad, an immediate unconstitutional deprivation has already occurred (and has now endured for almost a year).

A similar case was presented (and the action properly dismissed) in *Bandes* v. *Harlow & Jones*, 570 F. Supp. 955 (S.D.N.Y. 1983). In that case, upon seizure of power, the new Nicaraguan government issued "decree No. 422" for the seizure of property of former officials, coupled with a

"judicial procedure" for determining claims asserted against them. As noted by the District Court, the decree "require[d] the Attorney General to institute an action in the ordinary courts of Nicaragua in order to effect a confiscation, with the property owner entitled to notice and an opportunity to be heard either in person or by counsel." Pending such adjudication, control of corporate assets was transferred by the decree to a government-appointed "interventor" (instead of, as here, a "Commission on Good Government"). The District Court refused to enforce such a decree against New York property, despite the purported safeguard of an ultimate judicial determination in Nicaragua. It also rejected the contention that the seizure was only "temporary." The Court said:

> [W]ere these same events to occur in our domestic system the Fifth Amendment to the United States Constitution would proscribe the uncompensated taking of property by the state.
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>
> Applying this principle to the facts now before me, I find that the decrees of the Government Council do constitute a taking without compensation, that such a taking is "contrary to our public policy and shocking to our sense of justice," *Republic of Iraq, supra,* 353 F.2d at 51.

That ruling is plainly correct and applies fully to the present facts. To the same effect, *see F. Palicio y Compania, S.A.* v. *Brush,* 256 F. Supp. 481, 488 (S.D.N.Y. 1966) ("Acts of intervention . . . are undoubtedly inconsistent with our policy and laws . . . The failure to deprive the owners of technical title by decrees of intervention is of no significance . . ."), *aff'd,* 375 F.2d 1011 (2d Cir. 1967) (on the basis of the "well reasoned opinion" below); *cf., Zwack* v. *Kraus Bros. & Co.,* 237 F.2d 255, 259 (2d Cir. 1956) ("technical considerations as to the manner in which

the foreign states seek to expropriate [assets] are not controlling").

For a United States court to seize petitioners' property and hold it subject to the future orders of a foreign court, without proof or even a specification of the underlying claims, is an unconstitutional confiscation as well as an abdication of the judicial function of our own courts. Such an order is plainly inconsistent with petitioners' Due Process rights and the prior holdings of this Court.

POINT II

There Was No Statutory or Other Authority in the District Court to "Freeze" New York Assets Pending Possible Litigation in a Foreign Court.

Pursuant to Federal Rule 64, "all remedies providing for seizure of . . . property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action" including "attachment, garnishment, replevin, sequestration and other corresponding or equivalent remedies, however designated," are governed by the law of the state in which the District Court sits, in this case New York. Such a remedy is available in New York only by means of an attachment pursuant to CPLR § 6201, in an action in which "the plaintiff has demanded and would be entitled . . . to a money judgment". In the Court below, plaintiff specifically conceded that it was not entitled to an attachment under New York law because "plaintiff seeks equitable relief and not a money judgment." (Plaintiff's "Memorandum of Law Respecting the Applicability of the Attachment Statute," p. 2, submitted to the District Court). In such circumstances, the lower court had no authority to grant precisely the same pre-judgment relief by injunction.

This Court expressly so held in *DeBeers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212 (1944). In that case, as here, (a government injunction action against foreign companies) the government conceded that an attach-

ment was unavailable under New York law in an equitable action but requested equivalent relief by preliminary injunction (as here) to prevent the dissipation and transfer of defendants' United States assets. This Court noted that such relief under Federal Rule 64 is available only if permitted by a federal statute or by New York law and that:

> "It is admitted that there is no applicable federal statute and that, under the law of New York, an attachment may issue only in an action seeking a money judgment and will not issue in an equity suit such as the instant one."

(325 U.S. at 218) This Court held that in such circumstances the district court had no power to order the equivalent of a pre-judgment attachment by means of a preliminary injunction. Noting that "the name given to the process is not determinative," this Court stated:

> To sustain the challenged order would create a precedent of sweeping effect. This suit, as we have said, is not to be distinguished from any other suit in equity. What applies to it applies to all such. Every suitor who resorts to chancery for any sort of relief by injunction may, on a mere statement of belief that the defendant can easily make away with or transport his money or goods, impose an injunction on him, indefinite in duration, disabling him to use so much of his funds or property as the court deems necessary for security or compliance with its possible decree. And, if so, it is difficult to see why a plaintiff in any action for a personal judgment in tort or contract may not also, apply to the chancellor for a so-called injunction sequestrating his opponent's assets pending recovery and satisfaction of a judgment in such a law action. No relief of this character has been thought justified in the long history of equity jurisprudence.

> We are of opinion that the injunction issued in this case is not authorized either by statute or by the usages of equity and that the decree granting the injunction should be reversed.

(325 U.S. at 219, 222-23).

Pursuant to this Court's express holding in *DeBeers*, the District Court had no authority in the present case to issue a preliminary injunction equivalent to an attachment in an action in equity in which attachment was admittedly unauthorized and improper under New York law.

An attachment is also unavailable under New York law to secure a possible future judgment in a foreign country. *Sanko Steamship Co.* v. *Newfoundland Refining Co.*, 411 F. Supp. 285 (S.D.N.Y. 1976), *aff'd*, 538 F.2d 313 (2d Cir. 1976), *cert. denied*, 429 U.S. 858 (1976). In that case the District Court refused to attach the defendant's New York assets pending the determination of the claims in England, holding that

> "So far as we know, there is no provision of New York law which would authorize holding an attachment 'in limbo' pending the outcome of litigation going forward in some other jurisdiction."

Furthermore, by express provision of Rule 6212 of the New York Civil Practice Law and Rules (CPLR) an attachment requires that the motion for an order of attachment show "by affidavit and such other written evidence as may be submitted, that there is a cause of action [and] that it is probable that the plaintiff will succeed on the merits." Pursuant to CPLR § 6223 ("Burden of Proof") upon a motion by defendant to vacate or modify an order of attachment, "the plaintiff shall have the burden of establishing the grounds for the attachment, the need for continuing the levy and the probability that he will succeed on the merits." Respondent did not satisfy these statutory requirements.

The foregoing provisions were added to the CPLR in 1977 after a three judge court in *Sugar* v. *Curtis Circulation Co.*, 383 F. Supp. 643 (S.D.N.Y. 1974) held the New York statute unconstitutional under this Court's decisions in *Fuentes* v. *Shevin, supra,* and related cases, for failure to require a claimant to prove the grounds of his claim or to bear the burden of proof. In *Carey* v. *Sugar,* 425 U.S. 73 (1976), this Court vacated the decision of the District Court and remanded the case, solely to allow New York time to construe the statute in a manner that would avoid these constitutional objections. Thereafter, the New York attachment statute was specifically amended in 1977 to require the plaintiff seeking an order of attachment to establish "the probability that he will succeed on the merits" and to bear the burden of proof.*

The instant respondent did not establish probability of success on the merits; and it was not required by the lower courts to bear the burden of proof. The respondent nevertheless succeeded in obtaining a "so-called injunction" (*DeBeers, supra*) precisely equivalent to an attachment in circumstances in which the grant of such a remedy was contrary to governing local law and contrary to the constitutional standards established by this Court. This was done by the simple expedient of denominating its application as one for a preliminary injunction instead of an attachment, contrary to this Court's holding in *DeBeers, supra*, that "the name given to the process is not determinative." As in that case, "the injunction issued in this case is not authorized either by statute or by the usages of equity and . . . should be reversed." 325 U.S. at 223.

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* As noted by the District Court in *Sugar* v. *Curtis Circulation Company, supra*, 383 F. Supp. at 649, strict standards of proof are particularly important where (as here) the plaintiff "has never had a legally cognizable, concurrent possessory interest in the property which it attached" but only a "claim of fraud" against the defendant. *See also Carey* v. *Sugar, supra*, 425 U.S. at 77 n. 2.

POINT III

The District Court Lacked Jurisdiction Based Solely on the New York Situs of Real Property to Grant Relief on Completely Foreign Claims.

In *Shaffer* v. *Heitner,* 433 U.S. 186 (1977) this Court held that the mere presence of property in the State of the forum (shares of stock in a Delaware corporation "sequestered" by a Delaware procedure similar to attachment (433 U.S. at 194, n. 10) is insufficient to confer jurisdiction to try claims for wrongful conduct committed elsewhere. The Court specifically overruled long-standing prior case law upholding such *in rem* jurisdiction, and held that the "minimum contacts" standard of *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945) must be satisfied in such a case, as a matter of constitutional due process, before a local court may require the action to be defended there. This Court stated in *Shaffer* that "in cases such as . . . this one, the only role played by the property is to provide the basis for bringing the defendant into court. . . . In such cases, if a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of that jurisdiction should be equally impermissible."

In *Shaffer, supra,* this Court noted that the claimant had failed to "identify any act related to his cause of action as having taken place in Delaware," and dismissed the action for lack of jurisdiction. The present case presents substantially the same facts. The action is based entirely on alleged acts of misappropriation by defendant Marcos in the Philippines. His only alleged contact with New York is the presence of real estate there. Furthermore, it is not contended that he owns the New York real estate but that he allegedly controls the stock of Panamanian corporations which in turn own the stock of offshore corporations which do own the New York real estate. The alleged Marcos contacts with New York are thus *more*

remote than in *Shaffer* v. *Heitner,* where the ownership of shares of stock of a Delaware corporation was held insufficient to allow Delaware to adjudicate claims of misconduct by officers of a Delaware corporation. Clearly, there is no basis for trying such claims in the Southern District of New York under this Court's *Shaffer* ruling. *See also, Rush* v. *Savchuk,* 444 U.S. 286 (1980); *Worldwide Volkswagen Corp.* v. *Woodson,* 444 U.S. 320 (1980); *Helicopteros Nacionales de Columbia* v. *Hall,* 466 U.S. 408 (1984); *cf. Ope Shipping, Ltd.* v. *Allstate Ins. Co.,* 687 F.2d 639, 642 (2d Cir. 1982), *cert. denied,* 460 U.S. 1069 (1983), (corporations allegedly owned by ex-President Somoza of Nicaragua) ("Although the stock of these corporations may have been substantially or wholly owned by Somoza, under 'generally applicable principles' . . . that fact, standing alone, did not warrant the court in piercing the corporate veils so as to place ownership of the vessels in Somoza and thus in the Country of Nicaragua.")*.

In the present case, even if it were assumed without proof that Marcos owned the shares of the Panamanian corporations and even if two sets of corporate veils were then pierced for the jurisdictional purpose of assuming ownership of real estate in New York by Marcos, such ownership *still* would not be a sufficient basis to try the claims against him there. *Shaffer* v. *Heitner, supra.*

In *Shaffer* v. *Heitner, supra,* 433 U.S. at 210, this Court said:

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* *Cf. Olympic Capital Corp.* v. *Newman,* 276 F. Supp. 646, 658 (C.D. Cal. 1967) declining to apply an *alter ego* theory in such a case on the ground that "To apply such a doctrine here would be asking the court to apply the doctrine in one manner, i.e., make the property of the corporation the property of a stockholder, for the purposes of obtaining jurisdiction of the person of the stockholder and then to reverse the procedure, i.e. make the action of the individual stockholder the action of the corporation for purposes of creating liability *in the name of the corporation.* Neither reason nor law compel such a gymnastic.") (Emphasis by the Court.)

> The primary rationale for treating the presence of property as a sufficient basis for jurisdiction . . . is that a wrongdoer
>
> "should not be able to avoid payment of his obligations by the expedient of removing his assets to a place where he is not subject to an in personam suit." Restatement § 66, Comment a.
>
> . . . This justification, however . . . [a]t most . . . suggests that a State in which property is located should have jurisdiction to attach that property, by use of proper procedures, [citing *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 42 L.Ed.2d 751, 95 S.Ct. 719 (1975); *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600, 40 L.Ed.2d 406, 94 S.Ct. 1895 (1974); *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L.Ed.2d 556, 97 S.Ct. 1983 (1972); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 23 L.Ed.2d 349, 89 S.Ct. 1820 (1969)] as security for a judgment being sought in a forum where the litigation can be maintained consistently with International Shoe.

The respondent in the present case did not use "proper procedures" for an attachment, did not meet the *Fuentes* standard and did not demonstrate that it was pursuing a judgment in any proper forum consistently with *International Shoe*. In such circumstances, the orders issued by the District Court were plainly inconsistent with *Shaffer* v. *Heitner*, and beyond its jurisdiction.

POINT IV

The Act of State Doctrine Prohibits Adjudication of This Action in Our Courts.

In *Underhill* v. *Hernandez*, 65 F. 577 (2nd Cir. 1885), *aff'd*, 168 U.S. 250 (1897) this Court refused to adjudicate a suit for false imprisonment, assault and battery brought by an American citizen against a former "civil and military

chief" of the City of Bolivar, Venezuela. The Second Circuit held that "the acts of the defendant were the acts of the government of Venezuela, and, as such, are not properly the subject of adjudication in the courts of another government." (65 F. at 583.) In affirming, this Court noted that the defendant, at the time of the alleged wrongful acts, was a military leader of a revolutionary party which later prevailed, and that in such circumstances the Court of Appeals "was justified" in concluding that his acts were the "acts of the government of Venezuela." The Court (in a classic statement of the "Act of State" doctrine) said:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its territory.

168 U.S. at 252.

In *Underhill,* this Court and the Second Circuit Court of Appeals reviewed and followed numerous prior decisions holding that foreign governmental officials (and former officials, as in *Underhill* itself) are not subject to suit in our courts for acts committed within their own country, and similar decisions abroad, including a leading decision by the House of Lords that the King of Hanover, though a British subject residing in England, "was exempt from all liability to be sued in the Courts of that country for any acts done by him as King of Hanover . . . not upon the personal immunity of the sovereign from suit, but upon the principle that no court in England could sit in judgment upon the act of a sovereign, effected by virtue of his sovereign authority abroad" (*see* 65 F. at 580) and *Hatch* v. *Baez,* 7 Hun. 596 (New York App. Div. 2d Dep't 1876) where the New York court similarly held that "an action could not be maintained in the courts of the state against the former president of the Dominican Republic,

for acts done by him in his official capacity, although he had ceased to be president when the suit was brought." (*See* 65 F. at 580).

In *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 303-304 (1917) this Court applied these principles in refusing to hear a suit to regain property allegedly seized illegally by a foreign government within its own territory, even though the property itself had been brought to the United States and was within the jurisdiction of the United States courts. This Court held:

> The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is applicable to a case involving the title to property brought within the custody of a court, such as we have here, as it was held to be in the cases cited, in which claims for damages were based upon acts done in a foreign country . . .

In *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 436-437 (1964) this Court, reversing the judgment below, held that under the Act of State doctrine, the United States courts may not examine into the alleged illegality of an uncompensated taking of property within Cuba by the government of Cuba from a Cuban corporation. This Court stated:

> However offensive to the public policy of this country and its constituent States an expropriation of this kind may be, we conclude that both the national interest and progress toward the goal of establishing the rule of law among nations are best served by maintaining intact the act of state doctrine in this realm of its application.

The foregoing principles were re-affirmed as necessary "to effectuate general notions of comity among nations and among the prospective branches of the Federal Government" in *First National Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 762 (1972).

These principles have been consistently held to bar claims asserting the illegality of acts performed by ousted former officials of a foreign government, including acts allegedly performed by them for private gain. Thus, in *Bernstein* v. *Van Heyghen Freres, S.A.*, 163 F.2d 246 (2d Cir.) (L. Hand, J.), *cert. denied*, 322 U.S. 772 (1947) the court held that the Act of State doctrine barred a suit by a former Jewish citizen of Germany forced by Nazi officials to transfer his property to others under threats of imprisonment and death. The Court vacated an attachment against the transferred property, although it was then in New York, holding that it had no power to adjudicate the plaintiff's claims to that property, based as they were upon an extortionate wrongful taking by former foreign officials. In an opinion by Judge Learned Hand, the Court held it irrelevant that the wrongful acts were performed *before* the Nazi government's enactment of anti-Jewish laws or that "the acts of the 'Nazi officials' were unlawful under the laws of the Reich itself". The Court held that "even though we assume a German court would have held the transfer unlawful at the time it was made, that would [also] be irrelevant." 163 F.2d at 246. The Court held:

> We have repeatedly declared, for over a period of at least thirty years, that a court of the forum will not undertake to pass upon the validity under the municipal law of another state of the acts of officials of that state, purporting to act as such. [citations omitted] We have held that this was a necessary corollary of decisions of the Supreme Court, [citing *Underhill* v. *Hernandez*, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456; *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 38 S.Ct. 309, 62 L.Ed. 726.] and if we have been mistaken, the Supreme Court must correct it.*

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* *See also Dreyfus* v. *Von Finck*, 534 F.2d 24 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976) holding that in the absence of treaty, claims of unlawful extortion and theft of property committed by foreign officials in a foreign country against foreign victims give rise to no justiciable claim under United States law.

In *French* v. *Banco Nacional de Cuba,* 23 N.Y.2d 46 (1968) (Fuld, J.) (dismissing action and refusing to attach property located in New York), the New York Court of Appeals repeated the principle that "so long as the act is the act of the foreign sovereign, *it matters not how grossly the sovereign has transgressed its own laws.*" (emphasis by the Court). The Court further stated, "it is immaterial what form an act takes—whether it be an expropriation or confiscation, a conversion or a breach of contract." 23 N.Y.2d at 53.

In *Banco de Espana* v. *Federal Reserve Bank,* 114 F.2d 438 (2d Cir. 1940) these principles were applied to bar an action in New York to recover silver allegedly diverted from the Spanish government by deposed former officials, allegedly by means of illegal secret decrees. The Court held that the Act of State doctrine is *not* limited to acts which are "colorably valid" under foreign law (114 F.2d at 444), that it was irrelevant that the new government itself affirmatively requested the adjudication in our Courts (*Id.*), and that "so long as the act is the act of the foreign sovereign, it matters not how grossly the sovereign has transgressed his own laws." The Court ruled that in applying the "Act of State" doctrine, "[*b*]*y a 'governmental act' is meant no more than a step physically taken by persons capable of exercising the sovereign authority of the foreign nation.*" (*Id.*) (Emphasis supplied.). The Court added:

> If these acts took place, they took place within Spain. It has been squarely held that the courts of this country will not examine the acts of a foreign sovereign within its own borders in order to determine whether or not these acts were legal under the municipal law of the foreign state. (114 F.2d at 443).

The decision by the Second Circuit in the present case is a sharp departure from these long-established principles. The Court, citing this Court's opinion in *Alfred*

Dunhill of London v. *Republic of Cuba*, 425 U.S. 682, 695 (1976), justified such a departure on the ground that petitioners "fail to make the crucial distinction between the public and private acts of Marcos." (Appendix A at p. 32). That distinction however, referred to by Justice White in *Dunhill*, was not adopted by the full Court (*see Dunhill, supra*, 425 U.S. at 725) (Marshall, J., dissenting) ("The restrictive theory of sovereign immunity has not been adopted by this Court, but even if we assume that it is the law in this country, it does not mean that there should be a commercial act exception to the act of state doctrine.")*.

Furthermore, even if the Act of State doctrine distinguished between the private commercial activities of foreign officials and their "public" acts, as in certain cases involving claims of sovereign immunity, acts of alleged misappropriation of government funds committed by a foreign head of state by virtue of his powers as the head of his own government can scarcely be deemed "commercial activities" for such purpose, nor does it appear that such a distinction was what Justice White had in mind in *Dunhill*. On the contrary, the *Dunhill* reference to the "commercial" activities of modern governments is entirely unrelated to a case accusing a deposed head of state of 20 years of alleged abuses of presidential office, which presents the precise issues of foreign government and foreign politics which the Act of State doctrine has long barred from our courts. Moreover, it is a companion policy of our courts to refuse to adjudicate acts of a criminal

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* Justice Marshall expressed the views of four members of the Court (including Justices Brennan, Stewart and Blackmun). Justice Stevens did not concur in the portion of Justice White's opinion (Part III) which suggested a public/private Act of State distinction. Justice Powell also did not distinguish between "commercial and political" acts of a foreign state in his concurring opinion. Accordingly, the distinction appears to have been accepted by only three members of the Court and expressly rejected by at least four.

nature allegedly committed abroad or to enforce the penal laws of a foreign country. *See, e.g., Republic of Iraq* v. *First National City Bank*, 251 F. Supp. 575 (S.D.N.Y. 1965), *aff'd*, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966), citing as one of the fundamental reasons for refusal to enforce a foreign confiscation decree aimed at a deposed foreign official "the principle that one state will not enforce the penal laws of another" (241 F. Supp. at 574, citing cases); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964) (noting "the principle enunciated in federal and state cases that a court need not give effect to the penal or revenue laws of foreign countries or sister states" and that "a penal law for the purposes of this doctrine is one which seeks to redress a public rather than a private wrong.").

The essence of such an action is to embroil our judiciary in resolving issues of foreign politics, foreign government and foreign law. It has been agreed for generations that this is not a proper function of our courts.*

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* Principles of sovereign immunity of a head of state separately bar such a suit. *Psinakis* v. *Marcos*, (N.D. Cal. 1975), 1975 Dig. U.S. Prac. Int. L. 342, 344 (libel suit against Marcos dismissed); *Domingo* v. *Marcos*, No. C82-1055, slip op. (W.D. Wash. 1982) (suit against Marcos for allegedly sending agents to assassinate plaintiff, dismissed). "[E]ven if the foreign state does not enter an appearance to assert an immunity defense, a district court still must determine that immunity is unavailable . . ." *Verlinden* v. *Central Bank of Nigeria*, 461 U.S. 480, 493 n. 20 (1983). Such immunity has been held to apply to a former president after he leaves office. *See Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982) (immunity of former President of United States for alleged illegal acts while in office). The Constitution of the Philippines, as it existed while Marcos was in office, also extended express immunity from suit "during his tenure" and "thereafter", for "official acts done by him or by others pursuant to his specific orders during his tenure," which may explain respondent's delay in even attempting to pursue such a suit against him in the Philippines.

POINT V

The Action Should Also Be Dismissed on *Forum Non Conveniens* Grounds.

The plaintiff's attempt to try in this court 20 years of alleged misconduct by a foreign head of state should also be dismissed on *forum non conveniens* grounds.

Iran's action against its former Shah was dismissed on such grounds in *Islamic Republic of Iran* v. *Pahlavi*, 62 N.Y.2d 474 (1984), *cert. denied*, 105 S.Ct. 783 (1985). In that case the government of the Islamic Republic of Iran brought suit to recover the assets of the deposed Shah, charging him (as here) with decades of misrule. Even though the United States had agreed by treaty (the "Algerian Accords") "to inform United States Courts that in any litigation involving Iran and the Shah's estate sovereign immunity and the Act of State doctrine were not available as defenses . . .", 62 N.Y.2d at 484, the suit was dismissed on principles of *forum non conveniens*.

Writing for the New York Appellate Division in *Iran* v. *Pahlavi*, Judge Silverman pointed out:

> Repugnant as it may be to our philosophy, there can have been very few absolute monarchs in the history of the world who did not profit personally from their powers as such monarchs. The royal families of history did not become wealthy because they were shrewd private businessmen or farmers. One thinks of Elizabeth I and monopolies; the Kings of Spain and the wealth of the New World; the Tsars of Russia; King Solomon's Mines, etc., etc. And even today it is said that the King and the royal family of Saudi Arabia and the rulers of the other oil rich States of the Middle East have become enormously wealthy by the use of their powers and influence as rulers. These rulers and their families are said to

> have large investments and bank deposits in this country. Are the courts of New York really competent to hold these rulers responsible under our concept of fiduciary responsibilities for their use of their monarchical powers?
>
> This surely looks like the "political thicket" out of which courts should stay.

Islamic Republic of Iran v. *Pahlavi*, 94 A.D.2d 374, 376 (1st Dep't 1983), *aff'd*, 62 N.Y.2d 474 (1984). In affirming, the New York Court of Appeals added:

> Moreover, defendant probably cannot defend this claim in any realistic way because the witnesses and evidence are located in Iran under plaintiff's control and are not subject to the mandate of New York's courts.
>
> • • •
>
> Despite the fact that plaintiff's complaint requests monetary relief, it really seeks a sweeping review of the political and financial management of the Iranian government during the several years of the late Shah's reign with the object of accounting for and repossessing the nation's claimed lost wealth wherever it may be located throughout the world. For the reasons stated, that relief cannot properly be afforded by a New York forum with little if any nexus to the controversy and the taxpayers of this State should not be compelled to assume the heavy financial burden attributable to the cost of administering the litigation contemplated when their interest in the suit and the connection of its subject matter to the State of New York is so ephemeral (*Silver* v. *Great Amer. Ins. Co.*, 29 N.Y.2d 356, 361, *supra; Bata* v. *Bata*, 304 N.Y. 51, 56, *supra; Pietraroia* v. *New Jersey & Hudson Riv. Ry. & Ferry Co.*, 197 N.Y. 434, 439).

62 N.Y.2d at 483.

The instant action presents precisely the same fact situation, including the obvious fact that petitioners "cannot defend this action in any realistic way because the witnesses and evidence are located in [the Philippines] under plaintiff's control and are not subject to the mandate of New York's Courts." It is clear that petitioners would be at a total disadvantage, and the court without control over essential witnesses and evidence in any New York hearing on the merits or to determine the validity or probable validity of respondent's claims.

In its opinion below, the Second Circuit Court of Appeals sought to distinguish *Iran* v. *Pahlavi, supra,* by citing the Appellate Division's observation in that case that the action was not a dispute over the ownership of "specific property in this state." (Appendix A at p. 37, referring to 94 A.D.2d at 377). The Appellate Division's comment, however, was not directed to the absence of property in New York (there *was* such New York property) but at the fact that the action before it (like this one) was not a dispute over "ownership" but an action against the Shah for wrongdoing in Iran. The Appellate Division expressly noted: "Although the list of assets *does* include some assets with a relation to New York this is not a case of a dispute as to the ownership of specific property in this state . . . . This is plainly a transitory action arising in Iran." 94 A.D.2d at 377 (emphasis added).

The Iran case had a sequel (which was cited to the Second Circuit but not discussed in its opinion below) which made this point unmistakably clear. In that case, the complaint by the government of Iran was specifically re-cast to focus solely upon property of the Shah in New York. Nevertheless, the Appellate Division *again* dismissed the action and the New York Court of Appeals again affirmed. *Islamic Republic of Iran* v. *Pahlavi,* 99 A.D.2d 1009 (1st Dep't 1984), *aff'd,* 64 N.Y.2d 831 (1985). Commenting on the prior dismissal, the Appellate Divi-

sion expressly stated that "[t]he fact that some of the Shah's assets were in New York was specifically found [in the prior *Iran* case] to be insufficient to support jurisdiction here, *even as to those assets*" (emphasis supplied). The court added:

> We are of the opinion that this case is barely distinguishable from the companion case and raises precisely the same issues . . . Although respondents attempt to recast this action as one concerning property in New York (in rem jurisdiction) by submitting five reports to the United States Treasury Department identifying property here in which the Shah and/or his family had an interest, the actual causes of action do not truly differ from the ones presented in the prior action, upon which we concluded 'this is not a case of dispute as to the ownership of specific property in this state.'
>
> Thus, we remain convinced that New York's connection with all of this is, at best, tenuous, and the better approach is to exercise our discretion and reject this action. [*Id.* at 1010].

As in the *Iran* case, the instant respondent has no rights of "ownership" with respect to these properties and never did. Its rights, if any, are totally derivative from and dependent upon proof of the alleged wrongful acts in Manila. All of the essential evidence bearing on that 20-year presidency and any alleged abuse of the powers of that foreign office, if any, exists in the Philippines, not in New York. The conduct occurred there, the witnesses and documents are there, and the issues of governmental authority and responsibility are issues of Philippine government and Philippine law. The foreign contacts in the present case are "overwhelming". *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 257 (1981). That action was dismissed, as this action should be, on *forum non conveniens* grounds.

CONCLUSION

Although the District Court originally saw no risk of substantive injury to petitioners by an injunction to maintain the "status quo," the buildings have subsequently fallen into default, leading to foreclosure and receivership proceedings, actions by the ground lessors and threats of forfeiture of the leaseholds, as a result of the inability to transfer or finance the buildings for the period of almost one year that these restraints have endured. Petitioners are threatened with irreparable loss if this Court does not grant prompt relief, even though respondent has still presented no cognizable evidence of any of its claims.

On the multiple grounds stated above, petitioners respectfully request that a writ of certiorari issue to review the decision of the District Court, Southern District of New York, as affirmed by the Court of Appeals for the Second Circuit, granting a preliminary injunction freezing petitioners' properties.

Dated: February 20, 1987

Respectfully submitted,

MICHAEL J. SILVERBERG
(Counsel of Record)
LAWRENCE M. SANDS
PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON

Attorneys for Petitioners
New York Land Company, Joseph
Bernstein and Ralph Bernstein

PHILIP R. CARTER
BERNSTEIN CARTER & DEYO

Attorneys for Petitioners
Canadian Land Company of
America, N.V., Herald Center Ltd.
and Nyland (CF8) Ltd.

APPENDICES

APPENDIX A

Opinion of the United States Court of Appeals For the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1455, 1456, 1457—August Term, 1986

(Argued June 11, 1986 Decided November 26, 1986)

Docket Nos. 86-7350, 86-7356, 86-7362

THE REPUBLIC OF THE PHILIPPINES,

Plaintiff-Appellee,

—v.—

FERDINAND E. MARCOS, IMELDA MARCOS, RALPH BERNSTEIN, JOSEPH BERNSTEIN, GLICERIA TANTOCO, VILMA BAUTISTA, ANTONIO FLOIRENDO, PAUL A. CROTTY, as Commissioner of Finance of the City of New York, DEPARTMENT OF FINANCE OF THE CITY OF NEW YORK, CITY REGISTER'S OFFICE OF THE CITY OF NEW YORK, JOHN KINSELLA, County Clerk, Suffolk County, NEW YORK LAND COMPANY, a/k/a GREATNECKERS REALTY, INC., CANADIAN LAND COMPANY OF AMERICA, a/k/a CANADIAN LAND COMPANY OF AMERICA, N.V. (formerly Lastura Corporation, N.V.), LASTURA CORPORATION, N.V., HERALD CENTER, LTD. (formerly Volby, Ltd.), VOLBY, LTD., GLOCKHURST CORP., N.V., REALMAD PROPERTIES LTD., BRIWATER ASSOCIATES, a partnership, NYLAND (CF8) LTD. (formerly Ainsville, N.V.), AINSVILLE, N.V., and ANCOR HOLDINGS, N.V.,

Defendants,

NEW YORK LAND COMPANY, JOSEPH BERNSTEIN, RALPH BERNSTEIN, THE CANADIAN LAND COMPANY OF AMERICA, HERALD CENTER LTD., and NYLAND (CF8) LTD., and ANCOR HOLDINGS, N.V., and GLOCKHURST CORP., N.V.,

Defendants-Appellants.

Before:

OAKES, ALTIMARI, and MAHONEY,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Pierre N. Leval, *Judge*, granting a preliminary injunction to The Republic of the Philippines prohibiting the sale or transfer of certain New York real properly allegedly beneficially owned by Ferdinand and Imelda Marcos.

Affirmed.

MICHAEL J. SILVERBERG, New York, NY (Phillips, Nizer, Benjamin, Krim & Ballon, Lawrence M. Sands, New York, NY, of counsel), *for Defendants-Appellants New York Land Company, Joseph Bernstein and Ralph Bernstein.*

PHILIP R. CARTER, New York, NY (Bernstein, Carter & Deyo, Tina Schechter, New York, NY, of counsel), *for Defendants-Appellants The Canadian Land Company of America, Herald Center Ltd., and Nyland (CF8) Ltd.*

GERALD WALPIN, New York, NY (Rosenman Colin Freund Lewis & Cohen, Lawrence G. Golde, Steven Dixon, Donna Soares, New York, NY, of counsel), *for Defendant-Appellant Ancor Holdings, N.V.*

DAVID J. EISEMAN, New York, NY (Golenbock, Eiseman, Assor, Bell & Perlmutter, Jeffrey T. Golenbock, New York, NY, of counsel), *for Defendant-Appellant Glockhurst Corp., N.V.*

MORTON STAVIS, PETER WEISS, New York, NY (Center for Constitutional Rights, Franklin Siegel, Juan Saavedra-Castro, New York, NY, of counsel);

(Severina Rivera, Washington, DC, Mahlon F. Perkins, Jr., Ralph Shapiro, Michael Krinsky, Washington, DC, on the brief);

(Sills, Beck, Cummis, Zuckerman, Radin, Tischman & Epstein, P.A., Washington, DC, Clive S. Cummis, Jeffrey J. Greenbaum, Washington, DC, of counsel), *for Plaintiff-Appellee The Republic of the Philippines.*

OAKES, *Circuit Judge*:

This appeal is from a grant of a preliminary injunction in favor of The Republic of the Philippines ("The Republic") by the United States District Court for the Southern District of New York, Pierre N. Leval, Judge. The injunction continued an expiring temporary restraining order conditioned on the posting of a bond of $3 million against the transfer or encumbrance of five pieces of real property (the "properties"), four of which are located in New York City and one of which is in Long Island, New York. Judge Leval found that The Republic of the Philippines had met the standard under *Jackson Dairy, Inc. v. H. P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979) (per curiam), for issuing a preliminary injunction by "amply show[ing] 'sufficiently serious questions going to the merits to make them a fair ground for litigation' together with irreparable harm and a balance of hardships tipping in [the Republic's] favor." Order of May 2, 1986, as amended May 5, 1986 (quoting *Jackson Dairy*, 596 F.2d at 72).

At the heart of this case is the issue of who owns the five properties,[1] which consist of the following:

1. 40 Wall Street, a 71-story office building owned by Nyland (CF8) Ltd., a Netherlands Antilles corporation which in turn is owned by three Panamanian corporations that issued "bearer" shares to unknown persons.
2. The Crown Building, previously the Genesco Building, at 57th Street and Fifth Avenue, owned

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1. This issue was the subject of detailed sworn testimony in early 1986 before the Asian and Pacific Affairs Subcommittee (the Solarz Committee) of the House Committee on Foreign Affairs.

by The Canadian Land Company of America, formerly a Netherlands Antilles corporation called Lastura Corporation, which in turn is owned by three other Panamanian corporations that also issued "bearer" shares.

3. Herald Center, previously the Korvette Building, at Sixth Avenue and 34th Street, which is owned by Herald Center Ltd., formerly Voloby Ltd., a British Virgin Islands corporation. Herald Center Ltd. is owned by three other Panamanian corporations, again issuers of "bearer" shares.

   (These three properties have been managed by the appellants Joseph and Ralph Bernstein, and will sometimes be referred to as the Bernstein properties.)

4. 200 Madison Avenue, at the southwest corner of 36th Street and Madison Avenue, which is owned by Glockhurst Corp., N.V., which in turn is owned by the same three Panamanian corporations that own Herald Center Ltd.

5. Lindenmere, an estate in Suffolk County, Long Island, in the town of Brookhaven, Center Moriches, Long Island. Lindenmere was originally purchased by Luna 7 Corporation, which was owned by several Filipinos, and was later conveyed to Ancor Holdings, N.V., a Netherlands Antilles corporation. Beneficial ownership is claimed by defendant Antonio Floirendo, a Philippine businessman and close associate of the Marcoses.

The appellants are the corporations holding title to the properties, together with Joseph Bernstein and Ralph

Bernstein (the "Bernsteins"), whose law firm represents three of the corporate appellants, and New York Land Company, which is owned by the Bernsteins and which manages three of the properties. Other defendants named in this suit include Ferdinand E. Marcos and Imelda Marcos, the former President and First Lady of the Philippines who purportedly are the beneficial owners of the properties, and their alleged associates Gliceria Tantoco, Vilma Bautista, and Antonio Floirendo, although these individuals are not involved in this appeal and did not appear in the proceedings below.

The original complaint in this action, dated March 2, 1986, was filed in the Supreme Court of the State of New York, County of New York, prior to its removal to the United States District Court for the Southern District of New York. After the complaint was filed, but prior to removal of the case to federal court, President Corazon C. Aquino signed Executive Order Number 2, which, among other things, authorized the Commission on Good Government[2] to appeal to foreign countries to freeze the assets of the Marcoses and their associates. This order, as discussed later, contributed heavily to interjecting a federal issue into the case sufficient to confer federal question subject matter jurisdiction.

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2. The Commission on Good Government was created under Executive Order No. 1, dated February 28, 1986. One of its purposes is

> [t]he recovery of all ill-gotten wealth accumulated by former President Ferdinand E. Marcos, his immediate family, relatives, subordinates and close associates, whether located in the Philippines or abroad, including the takeover or sequestration of all business enterprises and entities owned or controlled by them, during his administration, directly or through nominees, by taking undue advantage of their public office and/or using their powers, authority, influence, connections or relationship.

In a section entitled "Background," the complaint outlines the well-publicized circumstances leading up to the recent upheaval in the Philippines. It first states that Ferdinand Marcos became president of the Philippines in 1966. On September 21, 1972, he declared martial law, thus allegedly becoming the dictator of the Philippines with personal control over its government and economy. During the entire period of his rule, and particularly after the imposition of martial law, Marcos allegedly participated in a variety of activities constituting a gross denial of human rights, including abduction, murder, torture, summary incarceration and execution, and control of the media. In addition, he is also alleged to have engaged in widespread and systematic theft of funds and properties that were and are the property of the Philippine government and people. The complaint charges that Marcos accomplished this by using techniques such as (1) accepting payments, bribes, kickbacks, interests in business ventures, and other things of value in exchange for the grant of government favors, contracts, licenses, franchises, loans and other public benefits; (2) blatantly expropriating private property for the benefit of persons beholden to or fronting for Marcos, with this expropriation at times carried out by violence or the threat of violence or incarceration; (3) arranging loans by the Philippine government to private parties who were Marcos's cronies or friends; (4) directly raiding the public treasury; (5) diverting loans, credits, and advances from other governments intended for use by the Philippine government; and (6) creating public monopolies which were placed in the hands of Marcos's loyalists or nominees. These actions of Marcos, together with similar acts by his wife, are said not only to be in violation of the laws

of the Philippines but also to have caused a massive drain upon the funds of the Philippine government.

Returning to the specific facts of this case, the complaint alleges that Ferdinand Marcos now resides in Hawaii with his wife, Imelda, after fleeing the Philippines and surrendering his position on February 25, 1986. The Marcoses allegedly do business in New York and use agents, representatives, and nominees in New York and elsewhere to assist in the operation of the properties. Specifically, the complaint charges that there was a conspiracy among Ferdinand and Imelda Marcos; Ralph and Joseph Bernstein; Gliceria Tantoco, a close friend and business associate of the Marcoses who until February 1985 dealt with the Bernsteins in New York; Vilma Bautista, who worked in the Philippine consulate in New York and the Philippine Mission to the United Nations and acted as personal secretary to Imelda Marcos in New York; Antonio Floirendo, a Philippine plantation owner and businessman who made a $600,000 payment as a deposit on Herald Center and claims to be the owner of Ancor Holdings; and numerous other persons, including Fe Giminez, personal secretary and confidante of Imelda Marcos. By virtue of the alleged conspiracy, assets and properties acquired by or for the benefit of the Marcoses were placed in the names of nominees. In this way the five properties in New York were allegedly purchased for the benefit of the Marcoses from the proceeds of moneys and assets stolen as stated above from the Philippine government.

The complaint goes on to allege that on or about February 26, 1986, the current Philippine government created the Presidential Commission for Good Government, under the chairmanship of former Senator Jovito

Salonga. This commission has been specifically directed to investigate and cause to be adjudicated in the Philippines any meritorious claims that specific properties or assets are the product of theft from the government and also to take steps to retrieve any government property taken by the Marcoses. The complaint states that the judicial system of the Philippines is patterned after that of the United States and that under the present government the system provides or will provide all elements of due process of law.

Finally, the complaint alleges that there have been clear indications that Marcos or his nominees are seeking to liquidate or transfer some assets, including the New York properties involved here. Unless the relief sought is granted, the complaint continues, the properties now held by or for the benefit of the Marcoses may be further transferred and dissipated, possibly to purchasers in good faith. Thus, the complaint asks that the court enjoin and restrain the defendants from transferring, conveying, encumbering, or in any way adversely affecting the rights of the government of the Philippines in and to the properties pending determination as to the true ownership of and entitlement to the parcels of land.

The district court granted this relief and issued a preliminary injunction on May 2, 1986. Judge Leval also appointed a receiver to collect the rents and profits, pay the costs of operating the properties, and otherwise administer them subject to the order of the court. The receiver's actions or conduct are not before us on this appeal. Since this grant, The Republic has augmented its considerable preinjunction discovery—obtained despite the defendants' lack of cooperation—with additional materials. Accordingly, it has submitted a supplemental ap-

pendix that includes material not before the district court at the time its injunction was granted, all subject to the objection of the appellants. Because we could hold the appeal pursuant to 28 U.S.C. § 2106 (1982) pending further findings and conclusions by the district court were we to conclude that subject matter jurisdiction was questionable, *see IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1018-19 (2d Cir. 1975), we will in a few instances refer to matter in the supplemental appendix but will do so provisionally and specifically.

The evidence of the Marcoses' ownership of the New York properties is complex and circumstantial. Most of it relates to the Bernstein properties: 40 Wall Street, the Crown Building, and Herald Center. Joseph Bernstein, both in deposition and in testimony before the Solarz House Subcommittee, repeatedly stated that he believed but did not know with certainty that Imelda Marcos owned the properties. That belief was based in large part on her behavior and comments during a series of meetings. For example, at a 1981 meeting at the Waldorf-Astoria with Mrs. Marcos and Gliceria Tantoco, Bernstein got the impression that they wanted to buy Herald Center, then known as the Korvette Building, to make it a Philippine commercial center. He testified that Mrs. Marcos said to Mrs. Tantoco, "Glissy, you put your stores there and make it expand our exports of Philippine goods." Over the years Bernstein "personally came to the impression that Mrs. Marcos had certain controls that [he] from time to time viewed as indicative of ownership, but [he didn't] actually know as a matter of fact who owns [Herald Center]." Bernstein considered two 1984 meetings at 15 East 66th Street, a townhouse owned by the Philippine government, not here involved, probably

the strongest indicators of Mrs. Marcos's involvement. At those meetings Bernstein and Mrs. Tantoco were trying to get money out of Mrs. Marcos; they needed at the time about $10 million to develop the 40 Wall Street property, and the Bernsteins had recommended to Mrs. Tantoco that it be sold. At the first meeting, Mrs. Marcos refused to contribute, saying "there is no money" and "paddle your own canoe," but at the same time stated that the building "wouldn't be sold." At the second meeting, she turned to Rolando Gapud, president of Security Bank & Trust Company of Manila and the Marcoses' financial adviser, to ask, "Do we have $10 million?" This gave Bernstein "the impression that if she had $10 million for it she must have some interest" in the building. On another occasion the Bernsteins, Mrs. Marcos, and Mrs. Tantoco were at the 66th Street townhouse in the evening and Mrs. Tantoco urged that they take a trip downtown; they drove to 40 Wall Street where Mrs. Tantoco and Mrs. Marcos got out of the car and looked at the building for a few minutes. When they returned to the car Mrs. Marcos remarked that it was a "nice" building, appearing to be proud of it.

As to Bernstein's connections with Ferdinand Marcos, Bernstein stated that in March 1982 he and Marcos met at a resort just south of Manila. On a veranda overlooking the Pacific they discussed the international tax aspects of the structure of a loan by a major French bank in the amount of some $34 million to Lastura, a Netherlands Antilles corporation that had acquired the building at 730 Fifth Avenue, later known as the Crown Building. Marcos, who seemed quite knowledgeable, wanted to make sure that the loan was structured to minimize interest costs by avoiding United States withholding taxes. Bern-

stein subsequently met Marcos in a meeting in Marcos's private quarters, the family area at Malacanang Palace, where Mrs. Marcos, Mrs. Tantoco, Ralph Bernstein, and Rolando Gapud were present. The main purpose of the meeting was to discuss a trust agreement that Marcos directed Bernstein to draft. Bernstein did so and delivered the draft to Mrs. Tantoco in New York. On a third occasion, when Bernstein was leaving the Philippines on a plane with Mrs. Marcos in April 1982, Marcos came to say good-bye and reminded Bernstein about the trust agreement.

Perhaps as significant pieces of evidence as any, however, were two documents discovered in Manila in Malacanang Palace after the departure of the Marcoses. These documents, which Bernstein authenticated before the Solarz Committee, were declarations of trust executed by Bernstein on April 4 and April 5, 1982, at the direction of Gapud. The April 4 declaration set Bernstein up as a trustee for the benefit of President Ferdinand E. Marcos with respect to all matters relating to Lastura Corporation; the April 5 declaration deleted Marcos's name and inserted Beneficio Investment, Inc., a Panamanian corporation.

Bernstein stated that there did not seem to be any distinction as to ownership between any of the four Manhattan properties. He thought the use of off-shore corporations and bearer shares routine, for tax purposes; he initially had a power of attorney to act on behalf of the three Panamanian corporations that owned Voloby and for a while held their shares of stock. Gapud, according to Bernstein, represented "the principals," though no one ever mentioned names; Bernstein's impression was that he represented the Marcos family. Moreover, early on, when

Mrs. Tantoco first took Bernstein to meet with Mrs. Marcos she referred to her as the "principal." Bernstein also met in Geneva in March 1985 with Ron Zamora, a counsel to President Marcos, who told him that "the principal" had decided to sell the four Manhattan properties. Bernstein sought to have the first chance to buy them since the Bernsteins had been involved with the properties for such a long time.

In addition to Bernstein's testimony, Victor Politas, former vice president of New York Land Company, testified before the Solarz Committee that both Bernstein and Mrs. Tantoco told him that the four New York properties were owned by Mrs. Marcos. Several documents allegedly found in Malacanang Palace after the Marcoses left the Philippines also indicate that the Marcoses had an interest in the four New York properties. One document, dated August 9, 1983, is from Mrs. Tantoco to "the Beneficial Owners of Canadian, Voloby, Nyland, and Glockhurst." This memorandum discusses both the feasibility of raising $16.8 million through a third mortgage on 40 Wall Street and the cash flow for the three Bernstein properties before and after the planned acquisition of 200 Madison Avenue. Another document, also found at the Palace, is entitled "New York Real Estate Accounts Summary Report" and describes in detail the equity investment in the three Bernstein properties as well as the financial condition of Voloby, Nyland, and Canadian Land Company, titleholders of Herald Center, 40 Wall Street, and the Crown Building, respectively. Other documentation appearing in the supplemental appendix also implicates the Marcoses.

Overall, the evidence of ownership of the Bernstein properties is strong, if not overwhelming, no evidence has

been offered to refute it, and the Bernstein brief on appeal fails to challenge the conclusion that the Marcoses are in fact the beneficial owners of the Manhattan properties.

Glockhurst Corp., N.V., is on slightly different footing. It argues that there is no competent evidence that the Marcoses beneficially owned Glockhurst or 200 Madison Avenue. Yet, their brief concedes that Glockhurst is owned by the very same Panamanian corporations that own Herald Center Ltd. Thus, whoever owns Herald Center by way of the Panamanian corporations also owns Glockhurst. As noted above, the August 9, 1983, memorandum to the "Beneficial Owners of Canadian, Voloby, Nyland, and Glockhurst" indicates the cash flow from the three properties, the Crown Building, 40 Wall Street, and Herald Center, "before the acquisition of Madison . . . [which is] to be achieved purely through borrowing (by Canadian and Glockhurst)," with subsequent cash flow after the acquisition of Madison also set forth. In addition, Joseph Bernstein testified that approximately $20 million of the proceeds of a mortgage taken on the Crown Building were transferred from Canadian Land to Glockhurst at the direction of Mrs. Tantoco for the purpose of buying 200 Madison Avenue. He also testified that Mrs. Tantoco indicated in a meeting at 66th Street by way of explanation to Mrs. Marcos that the four properties constituted "a balanced portfolio in the four corners of town." Before the Solarz Committee Bernstein testified that Mrs. Marcos would probably not have been at the so-called Barry Knox meetings in 1984 if she had not been an owner of 200 Madison Avenue. He also stated that 200 Madison Avenue was one of the four properties that Ron Zamora mentioned in Geneva in March 1985 as possibly

being put up for sale by the "principal." We note that it also appears from the supplemental appendix (which would need appropriate authentication and introduction into evidence on any hearing on a final injunction) that apparently $4.3 million was paid to Glockhurst from trust accounts in Manila managed by Rolando Gapud. The records of this payment conform to a document in the handwriting of Imelda Marcos's personal secretary, Fe Gimenez, showing payments of $5.5 million to Tantoco, $9.5 million to Voloby, $6 million to Floirendo, and $4.3 million to "Blackhurst" on November 4, 1983, for a total of $25.3 million.

The evidence of the Marcoses' ownership of Lindenmere, the Center Moriches property, is somewhat less compelling. Mrs. Marcos attended several parties there involving thirty to fifty people. Documents indicating substantial payments to Lindenmere, including the monthly payment of bills, were found in Gimenez's files in the Palace. An architect, Augusto Comacho, testified that he worked on both Lindenmere and The Republic's townhouse at 15 East 66th Street. Bills covering that work are in the record to the tune of several million dollars. When Comacho was not paid for this work, he sought payment directly from Mrs. Marcos and from her New York secretary, Vilma Bautista. He ultimately brought suit and settled for $825,000 after negotiating with Fe Gimenez. The $825,000 settlement was paid out of one of the trust accounts under Gapud's control to the law firm of Rosenman Colin Freund Lewis & Cohen, which then paid Comacho.

Title to Lindenmere is held by Ancor Holdings, N.V., a Netherlands Antilles corporation. Diosdado C. Ordonez, an employee of Revere Sugar Corporation and a long-

term associate of Antonio Floirendo, testified that Floirendo owns Ancor Holdings. According to Ordonez, Floirendo also owns 100% of Revere Sugar, an outcome of the acquisition of the sweetener division of Sucrest Corp. Evidence in the supplemental appendix tends to show, however, that the Marcoses also had an interest in Revere Sugar, a fact that helps to identify the financial ties between the Marcoses and Floirendo. The clearest example of these ties is contained in Fe Gimenez's accounting (in the joint appendix), which shows payments of $9.5 million to Voloby and $4.3 million to "Blackhurst," matching payments from the Gapud trust accounts to be found in the supplemental appendix. This very same accounting notes a $6 million payment to Floirendo. Other evidence links Floirendo to various payments on the Manhattan properties.

Of course, as Judge Leval noted, when considering a preliminary injunction he need not make conclusive factual findings. Rather, he indicated that no proofs had been submitted to rebut the inferences on which The Republic relies and concluded only that the standards for issuance of a preliminary injunction had been satisfied. We agree, and find that there is sufficient evidence as to all five properties to support the district court's grant of a preliminary injunction based on its findings of irreparable harm and probable ownership by the Marcoses.

Our task therefore is to determine whether there is federal jurisdiction, whether there are allegations sufficient to state a claim for relief, and whether there are, as the appellants argue, defenses making the claims not justiciable. These defenses include lack of standing on the part of The Republic, sovereign immunity, the act of state doctrine, and forum non conveniens, sovereign immunity.

A. *Federal Jurisdiction*

All parties in this case now advocate a finding of federal jurisdiction. This is, of course, immaterial. Federal jurisdiction cannot be conferred by agreement of the parties and irrespective of such agreement a federal court has a duty on its own motion to consider whether there is properly federal jurisdiction in the case before it. *See, e.g., Louisville & Nashville Railroad Co. v. Mottley*, 211 U.S. 149, 152 (1908). After the case was argued in our court, Judge Leval issued an opinion and order dated June 26, 1986, holding that there is federal jurisdiction in this case. Judge Leval thought the issue of jurisdiction not to be "open to serious doubt" because this is a case "arising under the Constitution, laws or treaties of the United States" and is therefore within federal question jurisdiction under 28 U.S.C. § 1331 (1982). We agree.

We recognize that the likelihood or inevitability that federal law matters will be raised in the answer or some subsequent pleading does not bring a case within federal question jurisdiction. *Mottley*, 211 U.S. at 152. Rather, we are to examine the "well-pleaded complaint" to determine whether it relies on any doctrine of federal law. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), reaffirms that the lower federal courts have "jurisdiction to hear, originally or by removal from a state court, only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." 463 U.S. at 27-28 (holding that a suit by a state tax authority both to enforce its levies against funds held in trust pursuant to an ERISA-covered employment benefit plan and to declare the validity of the

levies notwithstanding ERISA is neither a creature of ERISA itself nor a suit of which the federal courts may take jurisdiction). Thus, we must analyze the plaintiff's complaint separate and apart from any defenses that the defendants have asserted or might assert in the future, to see if this action arises under federal law.

Such an examination shows that the plaintiff's claims necessarily require determinations that will directly and significantly affect American foreign relations. In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964), the Supreme Court stated that issues involving "our relationships with other members of the international community must be treated exclusively as an aspect of federal law." While the issue in *Sabbatino* involved application of the act of state doctrine, in holding that the doctrine was to be applied as a matter of federal law the Court reasoned that foreign policy matters, entrusted by the Constitution primarily to the executive branch, have " 'constitutional' underpinnings," *id.* at 423, and that the problems that arise when foreign policy matters come before the courts "are uniquely federal in nature," *id.* at 424. As Judge Leval pointed out, two months after the *Sabbatino* decision the late Henry Friendly wrote that in the *Sabbatino* case "the Supreme Court has found in the Constitution a mandate to fashion a federal law of foreign relations." Friendly, *In Praise of Erie and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 408 n.119 (1964). The same judge wrote for this court in *Republic of Iraq v. First National City Bank*, 353 F.2d 47, 50 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966), that:

> The Supreme Court has declared that a question concerning the effect of an act of state "must be treated exclusively as an aspect of federal law." . . .

> We deem that ruling to be applicable here even though, as we conclude below, this is not a case in which the courts of the forum are bound to respect the act of the foreign state.

The opinion in *Republic of Iraq* went on to say that the decision whether to enforce the act of a foreign sovereign affecting property in the United States "is closely tied to our foreign affairs, with consequent need for nationwide uniformity," *id.*, and that "when property confiscated is within the United States at the time of the attempted confiscation, our courts will give effect to acts of state 'only if they are consistent with the policy and law of the United States,' " *id.* at 51. *See also Allied Bank International v. Banco Credito Agricola*, 757 F.2d 516, 521 (2d Cir.), *cert. dismissed*, 106 S. Ct. 30 (1985); *Restatement of Foreign Relations Law* § 469 comment b (Tent. Final Draft 1985); Henkin, *The Foreign Affairs Power of the Federal Courts*: Sabbatino, 64 Colum. L. Rev. 805, 815 (1964); Note, *The Federal Common Law*, 82 Harv. L. Rev. 1512, 1520-21 (1969). The principles stated in *Sabbatino* and *Republic of Iraq* extend beyond the act of state doctrine context in which both cases arose and support the existence of federal jurisdiction where the allegations in the complaint, as in this case, concern efforts by a foreign government to reach or obtain property located here.

Further support for holding that there is federal question jurisdiction over actions having important foreign policy implications is found in the very recent case of *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 106 S. Ct. 3229 (1986), in which the Court emphasized the flexible and pragmatic considerations involved in deter-

mining federal jurisdiction in "close" cases. *See id.* at 3236 n.12 (jurisdiction under section 1331 turns on the "nature of the federal issues at stake"); *see also Stone & Webster Engineering Corp. v. Ilsley*, 690 F.2d 323, 328 n.4 (2d Cir. 1982), *aff'd*, 463 U.S. 1220 (1983). As stated by Chief Judge Lumbard in *Ivy Broadcasting Co. v. American Telephone & Telegraph Co.*, 391 F.2d 486, 492 (2d Cir. 1968):

> We believe that a cause of action . . . "arises under" federal law if the dispositive issues stated in the complaint require the application of federal common law. . . . The word "laws" in § 1331 should be construed to include laws created by federal judicial decisions as well as by congressional legislation.

See also Illinois v. City of Milwaukee, 406 U.S. 91, 99-100 (1972); 13B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3563 at 60-61 (2d ed. 1984).

Weighing in favor of the application of federal common law here is the fact that prior to the filing of the complaint in the New York State Supreme Court, The Republic of the Philippines had already promulgated Executive Order No. 1 appointing the President's Commission on Good Government and charging it with the recovery of all ill-gotten wealth accumulated "by the former President." And, prior to the removal to federal court, Executive Order No. 2 had been promulgated freezing the assets of the Marcoses in the Philippines and appealing to foreign governments to freeze assets in their countries. Whether any confiscatory action by the Philippines will be entitled to credit in the United States courts is a question for another day, but it is surely a question

that will be governed by federal law within the original jurisdiction of the court under section 1331 of the Judicial Code.

On the face of the complaint, to be sure, the plaintiff brought this case under a theory more nearly akin to a state cause of action for conversion, requiring the imposition of a constructive trust or equitable lien upon the "ill-gotten" gains, *see Restatement of Restitution* §§ 128 comment *1*, 161 (1937), rather than under stated federal common law. But a "well-pleaded" complaint can be read in one of two ways to implicate federal law. As was held in *Avco Corp. v. Aero Lodge No. 735*, 376 F.2d 337, 340 (6th Cir. 1967), *aff'd*, 390 U.S. 557 (1968), federal court jurisdiction may not be defeated simply by pleading a state cause of action when that cause of action had been preempted by federal law—in *Avco*, section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 (1982). Discussing *Avco* in *Franchise Tax Board*, the Supreme Court said that *Avco* had held that federal jurisdiction exists even though the plaintiff pleads a state cause of action if federal law "is so powerful as to displace entirely any state cause of action." 463 U.S. at 23. Our question then would be whether the federal common law in the area of foreign affairs is so "powerful," or important, as to displace a purely state cause of action of constructive trust. We think it probably is: an action brought by a foreign government against its former head of state arises under federal common law because of the necessary implications of such an action for United States foreign relations. But even if we were wrong on this point, at the least this case presents "the presence of a federal issue in a state-created cause of action" within *Merrell Dow Pharmaceuticals, Inc. v.*

Thompson, 106 S. Ct. 3229, 3233 (1986). This is true because the action is brought by a foreign government against its former head of state to regain properly allegedly obtained as the result of acts while he was head of state.

We hold that federal jurisdiction is present in any event because the claim raises, as a necessary element, the question whether to honor the request of a foreign government that the American courts enforce the foreign government's directives to freeze property in the United States subject to future process in the foreign state. The question whether to honor such a request by a foreign government is itself a federal question to be decided with uniformity as a matter of federal law, and not separately in each state, *see Republic of Iraq*, *supra*, regardless of whether the overall claim is viewed as one of federal or state common law.

On this view, we need not determine whether there is federal jurisdiction under the Alien Tort Claims statute. We note simply that *Filartiga v. Pena-Irala*, 630 F.2d 876, 888-89 (2d Cir. 1980), does hold that individual claims involving torture are justiciable under the statute. Though there are generalized allegations of torture in violation of the human rights of unnamed individuals in the present complaint, we do not read the complaint as seeking restitution to private individuals and appellee does not suggest otherwise. *See also Dreyfus v. Von Finck*, 534 F.2d 24, 30-31 (2d Cir.) (coerced transfer of Jewish German citizen's property by Nazis not a violation of international law triable in a United States court), *cert. denied*, 429 U.S. 835 (1976); *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (acts of theft not violations

of international law and not triable here under Alien Tort Claims statute).

B. *Statement of a Claim*

We have already indicated that The Republic has offered sufficient evidence to justify the issuance of a preliminary injunction, evidence of both the Marcoses' beneficial ownership of the properties involved and the irreparability of the harm that would result if no injunction freezing the assets pending final determination of their ownership were issued. Additionally, in seeking to state a claim for relief under the federal or state common law theory of constructive trust and equitable lien, The Republic has also presented evidence that the funds used to acquire the properties were illegally obtained.

Bernstein testified that one night in a New York restaurant Mrs. Marcos started talking "in terms of what she owned in the world." After mentioning her Swiss bank account she pulled out a statement indicating that the account was worth in the nature of $120 million. Perhaps the strongest evidence in the record that the Marcoses' money was obtained illicitly is a memorandum dated March 25, 1983, for Ferdinand Marcos from the president of the Philippine National Bank (PNB), the official depository of The Republic of the Philippines. This document requests approval to charge temporarily against the Office of the President's accounts receivable several unliquidated advances from the bank's New York branch totaling over $9.8 million. The memorandum states that "[d]isposition of the receivable will subsequently be made from the Philippine Intelligence Fund to be provided out of PNB profits when the income or profit position of PNB can absorb it." Accompanying memoranda indicate

the actual items whereby the $9.8 million of expenditures was accumulated, many items representing deposits to the accounts of Fe Gimenez or Vilma Bautista in the hundreds of thousands of dollars. The memoranda also indicate a $300,000 payment to Voloby, payments to Mrs. Tantoco, and, separately, a $500,000 check from PNB to Antonio Floirendo dated July 23, 1982. The supplemental appendix contains an affidavit by Fernando Flores, Senior Assistant Manager of the Cash Department at the Manila office of Security Bank & Trust Company. Flores states that starting in 1982 he received instructions from Rolando Gapud, president of the bank, as to certain trust accounts. Large boxes of cash were brought to Flores by Gapud to be turned over to the Cash Department for counting and then deposited into the accounts designated by Gapud. From January 11, 1985, to August 13, 1985, deposits totaling over $20 million were made to just one of these accounts and in 1984-85 numerous payments were made from another to Vilma Bautista, Rosenman Colin Freund, and other accounts in New York.

We think The Republic has presented enough evidence of illegality to warrant a preliminary injunction based on a claim for imposition of a constructive trust or an equitable lien. As Judge Cardozo put it when he was on the New York Court of Appeals, "A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee." *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 386, 122 N.E. 378, 380 (1919). The court " 'reserves freedom to apply this remedy to whatever knavery human ingenuity can invent.' " *Si-*

monds v. Simonds, 45 N.Y.2d 233, 241, 380 N.E.2d 189, 194, 408 N.Y.S.2d 359, 363 (1978) (quoting Bogert, *Trusts and Trustees* § 471 at 29 (2d ed. rev. 1978)). And, " '[a] constructive trust will be erected wherever necessary to satisfy the demands of justice. . . . [I]ts application is limited only by the inventiveness of men who find new ways to enrich themselves unjustly by grasping what should not belong to them.' " *Id.* at 241, 380 N.E.2d at 194, 408 N.Y.S.2d at 363 (quoting *Latham v. Father Divine*, 299 N.Y. 22, 27, 85 N.E.2d 168, 170 (1949)). *See also Restatement of Restitution* § 160 comment a (1937) (constructive trust is simply a remedy to prevent unjust enrichment and may or may not involve a fiduciary relationship); *id.* § 160 comment g (stating that where property is held by one person upon a constructive trust for another and the former transfers the property to a third person who is not a bona fide purchaser, the interest of the beneficiary is not cut off); *id.* § 168 (same). Moreover, the *Restatement of Restitution* makes it evident that the doctrine of equitable liens may be operative here, perhaps requiring a less specific tracing of the proceeds than in the case of a constructive trust. *See id.* §§ 128 comment *l*, 161.

If the overall claim is one based on state law, it is clearly sufficient under the New York law stated above. Even if the claim is one under federal common law, it would still be sufficient if state law is adopted as the federal common law, as is appropriate in cases such as this where adoption of state law does not conflict with federal policy. *See United States v. Crain*, 589 F.2d 996, 999 (9th Cir. 1979). Moreover, the sufficiency of the claim as a matter of federal common law is shown by analogy to federal cases involving the duties of federal employees

to the United States. For example, *United States v. Carter*, 217 U.S. 286, 306 (1910), demonstrates that the law of constructive trusts (and equitable liens) finds a basis in federal common law. There the Court stated, "The larger interests of public justice will not tolerate, under any circumstances, that a public official shall retain any profit or advantage which he may realize through the acquirement of an interest in conflict with his fidelity as an agent [of the United States]." Our own case, *United States v. Podell*, 572 F.2d 31, 35 (2d Cir. 1978), holds likewise, and as a matter of federal common law imposed a constructive trust on moneys received by a United States congressman who violated both his fiduciary duty and a conflict of interest statute by appearing before federal agencies on behalf of a private client.

The appellants have argued that under New York Civ. Prac. R. § 6201 (McKinney 1980) a party who does not seek a money judgment is not entitled to prejudgment attachment and therefore cannot obtain a preliminary injunction. Of course a party is not entitled preliminarily to enjoin the transfer of property that will be irrelevant to a final judgment. *De Beers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 220 (1945). However, preliminary injunctions are proper to prevent a defendant from making a judgment uncollectible, *In re Feit & Drexler, Inc.*, 760 F.2d 406, 416 (2d Cir. 1985); *see also International Controls v. Vesco*, 490 F.2d 1334, 1347 (2d Cir.), *cert. denied*, 417 U.S. 932 (1974), and "[a] preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally." *De Beers Consolidated Mines*, 325 U.S. at 220. Here, the preliminary relief sought by The Republic is intended to prevent any transfer or encumbrance of the

properties that would place them beyond The Republic's reach or would prevent reconveyance of the properties to The Republic. There thus appears to be no bar to the grant of a preliminary injunction and the district court may either itself determine ownership or defer to Philippine proceedings, assuming they proceed with sufficient dispatch to avoid raising problems of due process as to the property here.

C. *Standing and Justiciability*

Glockhurst and Ancor, in reliance on *Coleman v. Miller*, 307 U.S. 433 (1939), and *Baker v. Carr*, 369 U.S. 186 (1962), claim that this case is not justiciable because its determination involves unmanageable standards and because it potentially could cause embarrassment to the executive in its conduct of foreign affairs. But we agree with The Republic that there is nothing more unmanageable about this case than about any other case involving theft, misappropriation, corporate veils, and constructive trusts. The United States has made it clear that it does not fear embarrassment if the courts of this country were to take jurisdiction of this and other disputes between The Republic and ex-President Marcos. On the contrary, by letter and motion granted in open court for leave to file a statement of interest, all pursuant to *Allied Bank International v. Banco Credito Agricola*, *supra*, the Department of Justice, with the concurrence of the Office of the Legal Adviser to the Department of State has argued that with respect to the act of state doctrine the burden is on the party asserting the applicability of the doctrine, that defendants have to date not discharged their burden of proving acts of state, and that, as to the allegations of head of state immunity, the defendants do not have

standing to invoke the doctrine. By implication this position carries with it the proposition that the United States does not consider this suit to be an improper intrusion on its management of foreign affairs.[3]

The New York Land Company and the Bernsteins' brief questions the standing of The Republic of the Philippines to sue for alleged injuries to private citizens, but The Republic's brief points out that restitution to

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3. This conclusion is reinforced by a declaration of Michael H. Armacost, Undersecretary of State for Political Affairs, made on March 15, 1986, submitted to the United States Court of International Trade in connection with a pending suit before that court, and in our record. Undersecretary Armacost pointed out that the United States' relations with the Philippines are extremely important and that it is the policy of the United States to strengthen and broaden those relations, especially in light of the two countries' shared basic values such as a commitment to democratic government and respect for human rights. The Armacost declaration also points out that the United States has two of its largest overseas military facilities located in the Philippines, facilities of critical importance to the security of both nations, that the two countries have numerous defense agreements, and that the United States has provided the Philippines with over $250 million in military assistance in the past five years and permits Philippine nationals to enlist in the United States Navy.

The statement also emphasizes the important United States-Philippine economic relationship involving in 1985 alone over $3.7 billion worth of bilateral trade, a direct United States investment in the Philippines of over $1.2 billion, and United States monetary aid to the Philippines totaling $226 million. The statement also notes United States-Philippine cooperation in numerous areas including agriculture, education, nuclear energy, and science, and mentions that the United States government recognized the new Philippine government headed by Corazon Aquino and "welcomed its commitment to fulfill the democratic aspirations of the Filipino people." The declaration refers to the establishment of the official Presidential Commission on Good Government headed by former Philippine Senator Jovito Salonga and to the United States' agreement to receive Senator Salonga at a diplomatic level. Undersecretary Armacost asserted that the Aquino government will view the United States' actions on this matter as an important indicator of the future course of our bilateral relations and stated that it is in the foreign policy interests of the United States to honor the Philippine government's requests at the earliest possible time.

private individuals "is no part of this suit" and we take that at its face value.

D. *The Act of State Doctrine*

Appellants strongly assert that the act of state doctrine prohibits adjudication in our court of the legality of the acts of a foreign head of state within his own country. We are cited to *Underhill v. Hernandez*, 65 Fed. 577 (2d Cir. 1895), *aff'd*, 168 U.S. 250 (1897), and to *Hatch v. Baez*, 7 Hun. 596 (N.Y. Sup. Ct. 1876). In *Underhill* this court refused to permit a suit for false imprisonment and assault and battery against a former "civil and military chief" of the city of Bolivar, Venezuela. The Supreme Court, affirming, held that every sovereign state is bound to respect the independence of every other sovereign state. 168 U.S. at 252. In *Hatch* the New York Supreme Court held that an action could not be maintained in New York against the former president of the Dominican Republic for acts done in his official capacity even though he had ceased to be president when the suit was brought. *See also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 436-37 (United States court may not examine the alleged illegality of an uncompensated taking of property within Cuba by the government of Cuba from a Cuban corporation), and *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-04 (1918) (suit to regain property alleged to have been illegally seized by a foreign government within its own territory dismissed though within the jurisdiction of the United States court), both reaffirmed in *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972) (plurality opinion); *Bernstein v. Van Heyghen Freres, S.A.*, 163 F.2d 246, 249 (2d Cir.) (court will not pass on validity under law of foreign state of acts of

officials of that state purporting to act as such), *cert. denied*, 332 U.S. 772 (1947); *Banco de Espana v. Federal Reserve Bank of New York*, 114 F.2d 438 (2d Cir. 1940) (act of state doctrine barred suit against former officials of deposed Spanish government for having diverted silver by means of illegal secret decrees).

Sabbatino treats the act of state doctrine as resting fundamentally on separation of powers concerns. There the court decided

> only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

376 U.S. at 428. While the position taken by the Executive is a relevant factor, it is not dispositive. *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. at 773 & n.4 (Douglas, J., concurring in result); *id.* at 775-76 (Powell, J., concurring in judgment); *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 884 (2d Cir. 1981). "Whether to invoke the act of state doctrine is ultimately and always a judicial question." *Allied Bank International v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 521 n.2 (2d Cir.), *cert. dismissed*, 106 S. Ct. 30 (1985).

Restatement (Second) of Foreign Relations Law § 41 (1965) provides further definition of the doctrine: United States courts "will refrain from examining the validity of an act of a foreign *state* by which that state has exercised

its jurisdiction to give effect to its *public* interests" (emphasis added). *See also id.* § 41 comment d at 127; *Restatement (Revised) of Foreign Relations Law* § 428 (Tent. Draft No. 4, 1983) (no review of acts of a "foreign state taken in its sovereign capacity"); *id.* § 469 (Tent. Draft No. 7, 1986) (no review of "acts of a governmental character"). That the acts must be *public* acts of the *sovereign* has been repeatedly affirmed. *See Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 694 & n.10 (1976) (noting that in *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918), *Oetjen*, *supra*, and *Underhill*, *supra*, the conduct "was the *public act* of those with authority to exercise sovereign powers" (emphasis added)); *Dunhill*, 425 U.S. at 720 (Marshall, J., dissenting) (defining an act of state more broadly than the majority, but limiting it to a "foreign state . . . exercis[ing] a sovereign power either to act or to refrain from acting"); *Sabbatino*, 376 U.S. at 401 (the doctrine precludes inquiry into validity of "public acts" of foreign sovereign within its own territory); *Filartiga v. Pena-Irala*, 630 F.2d at 889 (doubting whether action by a state official, in violation of the constitution and laws of Paraguay, unratified by the government, could be characterized as an act of state); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 73 (2d Cir.) (underscoring that acts must be "public" and "governmental" for the doctrine to apply), *cert. denied*, 434 U.S. 984 (1977); *Jimenez v. Aristeguieta*, 311 F.2d 547, 557-58 (5th Cir. 1962) (doctrine applies only when an official having sovereign authority acts in an official capacity; a dictator is not the sovereign and his financial crimes committed in violation of his position and not in pursuance of it are not acts of a sovereign, but rather were for his own benefit and "as far

from being an act of state as rape"), *cert. denied*, 373 U.S. 914 (1963); *see also Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1380 (5th Cir. 1980); *Sharon v. Time, Inc.*, 599 F. Supp. 538, 544 (S.D.N.Y. 1984).

Cases relied on by appellants to the effect that acts that are illegal in the foreign state may still be protected from judicial scrutiny under the act of state doctrine are not to the contrary. In *Banco de Espana*, 114 F.2d at 444, this court held that if the acts are those of a foreign sovereign—including acts of officials purportedly operating in their official capacity—then the act of state doctrine applies. *See also Bernstein*, 163 F.2d at 249; *French v. Banco Nacional de Cuba*, 23 N.Y.2d 46, 52, 242 N.E.2d 704, 709, 295 N.Y.S.2d 433, 440 (1968) (so long as the act is the act of the foreign sovereign, it matters not that the sovereign has transgressed its own laws).

Appellants simply fail to make the crucial distinction between acts of Marcos as head of state, which may be protected from judicial scrutiny even if illegal under Philippine law, and his purely private acts. Although the distinction between public and private acts of a foreign official may be difficult to determine, our courts have repeatedly done so. *See Dunhill*, 425 U.S. at 695 ("Distinguishing between the public and governmental acts of sovereign states on the one hand and their private and commercial acts on the other is not a novel approach."); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 308-09 (2d Cir. 1981) (interpreting the commercial exception to the Foreign Sovereign Immunities Act), *cert. denied*, 454 U.S. 1148 (1982). Since the burden of proof is on the party invoking the act of state defense, *Dunhill*, 425 U.S. at 694, appellants must

ultimately demonstrate that the challenged acts of Marcos were in fact public acts (the allegations of the complaint covering both public and private acts). In addition, *Dunhill* appears to require a certain amount of formality to indicate that the act is in fact the act of the sovereign, although probably not the degree of formality suggested by former Judge Sofaer in *Sharon*, 599 F. Supp. at 544-45.

Two other considerations may limit the applicability of the doctrine even to Marcos's public acts. First, the Marcos government is no longer in power. Thus, the danger of interference with the Executive's conduct of foreign policy is surely much less than the typical case where the act of state is that of the current foreign government. Neither of the two cases in our circuit that have applied the doctrine to the acts of former governments, *Banco de Espana*, *supra*, and *Bernstein*, *supra*, discuss the separation of powers issue, and both cases appear more strongly to rely on the earlier sovereign immunity rationale. In *Sabbatino* the Court explicitly questioned this aspect of *Bernstein* in light of the doctrine's recast separation of powers rationale: "The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence, as in the *Bernstein* case, for the political interest of this country may, as a result, be measurably altered." 376 U.S. at 428. Thus, before the doctrine is applied even to Marcos's public acts, the court must weigh in balance the foreign policy interests that favor or disfavor application of the act of state doctrine.

Moreover, the act of state doctrine reflects respect for foreign states, so that when a state comes into our courts

and asks that our courts scrutinize its actions, the justification for application of the doctrine may well be significantly weaker. *Restatement (Revised) of Foreign Relations Law* § 469 comment e (Tent. Draft No. 7, 1986). We note, however, that the *Restatement* refers to acts of the current government, not the situation here.

In short, the district court will necessarily scrutinize the acts that The Republic challenges. Defendants must present evidence that these acts were public (e.g., that Marcos's wealth was obtained through official expropriation decrees or public monopolies). The court then must decide whether to examine these public acts in light of the considerations discussed above. If it chooses not to do so—and the determination whether the Marcoses obtained their wealth illegally, and hence the determination of ownership of the property at issue in this case, is impossible without such scrutiny—the court should consider deferring to a Philippine adjudication that comports with due process. But in any event, at this stage we agree with the position of the United States quoted above that the defendants have not discharged their burden of proving an act of state. Only after that burden is met do other relevant factors need to be considered.

E. *Acts of the Current Government*

Appellants' next claim is that The Republic's Executive Orders are confiscation decrees affecting property in the United States. In *Republic of Iraq*, *supra*, where the Republic of Iraq sought to confiscate a bank account and stock held in a custodian account in New York by the late King Faisal II, we ruled that the effect of a foreign act of state affecting property within the United States is a question of federal law and that a confiscation decree will

be given consideration only if the decree is consistent with our policy and laws. 353 F.2d at 51. We then held that the decree in question was not consistent with our law. Citing *Banco de Vizcaya v. Don Alfonso de Borbon y Austria*, [1935] 1 K.B. 140, we held that confiscation of the assets of an individual is shocking to our sense of justice "even if he wears a crown," and pointed out that our Constitution sets itself against such confiscations not only by virtue of guarantees of due process and the Fifth and Fourteenth Amendments, but by specific prohibitions of bills of attainder in Article I. 353 F.2d at 51-52.

But, of course, the decrees in question in this case are not in and of themselves confiscation decrees. Here, no confiscation has occurred. In *Republic of Iraq*, the plaintiff argued that by virtue of its ordinance it had acquired title to the King's New York property when the ordinance was promulgated. 241 F. Supp. 567, 572 (S.D.N.Y. 1965). Similarly, in *Bandes v. Harlow & Jones, Inc.*, 570 F. Supp. 955 (S.D.N.Y. 1983), the district court considered that the Nicaraguan actions there involved had confiscated U.S.-located property. *Id.* at 960, 963. Here, by contrast, an examination of Executive Orders Nos. 1 and 2 shows that they do not purport to seize the United States properties of the Marcoses, nor does The Republic seek to enforce these orders as the basis for a recovery, even though they were accompanied by adequate evidence to warrant the issuance of a preliminary injunction against the transfer of the properties. The contention that a future adjudication in the Philippines will not comport with due process is not ripe. We have every reason to believe—at least we have no reason to suspect to the contrary—that any Philippine decree will comport with due process of law as the courts of the United States

would envisage it. The complaint seeks recovery of property illegally taken by a former head of state, not confiscation of property legally owned by him.

F. *Sovereign Immunity*

Appellants also claim that the Marcoses are entitled to sovereign immunity. We agree that appellants have no standing to assert this claim. But even if appellants had standing, we are not at all certain that the immunity of a foreign state, though it extends to its head of state, *Restatement (Second) of Foreign Relations Law* §§ 65, 66(b) (1965), goes so far as to render a former head of state immune as regards his private acts. *See The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 145 (1812); Sucharitkul, *State Immunities and Trading Activities in International Law* 27-28, 32-34, 47-50 (1959). The rationale underlying sovereign immunity—avoiding embarrassment to our government and showing respect for a foreign state—may well be absent when the individual is no longer head of state and the current government is suing him. In any event, the Foreign Sovereign Immunity Act may not support appellants' immunity claim in light of its "commercial activity" exception, 28 U.S.C. § 1603(d), (e) (1982), and as we said above, these appellants lack standing to raise the immunity issue on the Marcoses' behalf, *Restatement (Second) of Foreign Relations Law* § 71 (1965).

We note *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). There it was held that a former President of the United States enjoyed immunity from damages liability for acts within the outer perimeter of his official responsibility. *Id.* at 755-56. To the extent that it appears, as the proof develops, that this suit ultimately rests on official acts,

the district court will of course be free to take that into account.

G. *Forum Non Conveniens*

The district court, in refusing to dismiss on forum non conveniens grounds, noted that the plaintiff seeks to impress a constructive trust only in regard to property located in New York and seeks the appointment of a receiver pending final resolution of the case. At this stage, we note that forum non conveniens determinations are committed to the sound discretion of the trial court. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981). True, *Islamic Republic of Iran v. Pahlavi*, 94 A.D.2d 374, 464 N.Y.S.2d 487 (App. Div. 1983), *aff'd*, 62 N.Y.2d 474, 467 N.E.2d 245, 478 N.Y.S.2d 597 (1984), held that Iran's in personam action against the former Shah and his wife alleging that they had accepted bribes, misappropriated funds, and embezzled or converted billions of dollars belonging to the national treasury of Iran should be dismissed because the litigation had little relation or connection to the state of New York other than the presence of the Shah and his wife in the state. There, the Appellate Division noted that it was *not* a dispute over the ownership of "specific property in this state." 94 A.D.2d at 377, 464 N.Y.S.2d at 490. Rather, the complaint there asked that a constructive trust be imposed "on assets of the defendants throughout the world." *Id.* at 377, 464 N.Y.S.2d at 490. Our case, however, involves a dispute as to the ownership of specific property in this state and only such property. Here the plaintiff seeks to impress a constructive trust only on assets in New York. The assets in dispute are pieces of real property, fixed and immovable. It thus seems difficult to deem the Southern

District of New York an inconvenient forum. Nor is there any showing that an alternative forum is available and adequate to provide appropriate remedies in respect to this property, ultimate ownership of which rests with the holders of bearer shares of off-shore corporations. We put little or no stock in the suggestion made at oral argument that these shares could be located, attached, and the corporations themselves properly be brought before this or some other court.

Judge Leval rejected the forum non conveniens argument, noting that the complaint only seeks the United States' recognition of a Philippine decree and that the district court will not be asked to try the basic issues accusing President Marcos of unlawful takings. He did see that the court might be required to adjudicate whether Marcos is the owner of the New York properties, evidence as to which is in both New York and the Philippines, but he did not visualize that the case would involve questions of unlawful takings and the rights of the Philippine Republic. As for final relief, Judge Leval stated that evidence of wrongdoing would be reviewed only to the extent necessary to inquire whether the ultimate Philippine decree, if any, is consistent with the law and policy of the United States under *Republic of Iraq*. This action is merely ancillary to an eventual Philippine decree or judgment and was brought in the Southern District only because the real estate is located here.

Judgment affirmed.

APPENDIX B

Opinion and Order of United States District Court Dated May 2, 1986

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 86 Civ. 2294 (PNL).

NEW YORK LAND COMPANY, et al.,

Petitioners,

v.

REPUBLIC OF PHILIPPINES,

Respondent.

May 2, 1986.

Amended May 5, 1986.

Phillips, Nizer, Benjamin, Krim & Ballon, New York City (Michael J. Silverberg, of counsel), for petitioners Joseph and Ralph Bernstein and New York Land Co.

Bernstein, Carter & Deyo, New York City (Philip Carter, of counsel), for petitioners Canadian Land Co. of America, N.V., Herald Center, Ltd. and Nyland (C F 8) Ltd.

Rosenman, Colin, Freund, Lewis & Cohen, New York City (Gerald Walpin and Lawrence G. Golde, of counsel), for defendant Ancor Holdings, N.V.

Golenbock, Eiseman, Assor, Bell & Perlmutter, New York City (Jeffrey T. Golenbock and David J. Eiseman, of counsel), for Glockhurst Corp., N.V.

James Drew & Associates, Washington, D.C. (Severina Rivera, of counsel), and Center for Constitutional Rights,

Appendix B—Opinion and Order of United States District Court Dated May 2, 1986

New York City (Morton Stavis, Peter Weiss, Franklin Siegal and Juan Saavedra-Castro, of counsel), for respondent.

OPINION AND ORDER

LEVAL, District Judge.

This is a motion by several defendants to vacate a temporary restraining order ("TRO") originally imposed in New York State Court and continued with modifications by this court after some of the defendants removed the action. The moving defendants contend that the temporary restraining order must be vacated because, absent consent, the court lacks the power under the Federal Rules of Civil Procedure to continue such an order beyond the twenty days permitted by Rule 65(b). *Pan American World Airways* v. *Flight Eng'rs' Int'l Ass'n,* 306 F.2d 840 (2d Cir. 1962). Plaintiff contends the restraints should be continued (in present or in further modified form) either as a temporary restraining order pending submission of further proofs on the preliminary injunction hearing, or as a preliminary injunction supported by plaintiff's submissions.

Plaintiff is the Republic of the Philippines. The principal defendants are the former President of the Philippines, Ferdinand Marcos and his wife Imelda Marcos. They have been served with process but have not appeared. Plaintiff has submitted a proposed default judgment against them. The complaint alleges that during President Marco's term in office, he and Mrs. Marcos wrongfully took property belonging to the Republic of the Philippines. It is alleged that part of the moneys so taken were used by President and Mrs. Marcos to invest in valuable New York real property, including 730 Fifth Avenue (the Crown Building); Herald Center (formerly

Appendix B—Opinion and Order of United States District Court Dated May 2, 1986

Korvettes) at 34th Street and 6th Avenue; 40 Wall Street; 200 Madison Avenue, and a large mansion in Center Moriches, Long Island referred to as the Lindenmere Estate (the "Properties").

The moving defendants are several real estate holding companies, and their alleged principals and managers, which are the record holders of the Properties, allegedly as nominees for President and Mrs. Marcos. (The defendant-movants are hereinafter referred to as the "Record Holders.") The TRO which the Record Holders seek to have vacated essentially bars the defendants from transferring or encumbering the Properties.

When the action was brought in New York State Court, a temporary restraining order was entered barring the defendants from taking any of a variety of actions with respect to the Properties. After removal, this court continued the order pending the preliminary injunction hearing but substantially eased its terms to permit profitable commercial use of the property to the maximum extent while protecting plaintiff's claimed equity interest.

Shortly after the removal, expedited discovery was ordered and a schedule was set for the submission of proofs on the preliminary injunction hearing. The schedule was delayed partly at the instance of defendants, who, for example, requested adjournment of the depositions of Joseph and Ralph Bernstein so that they could first testify before a Committee of Congress. In seeking that delay the defendants consented to adjournment of the preliminary injunction schedule.

Approaching the expiration date of the consent given, defendants suddenly advised plaintiff that they would give no further consent, and refused to furnish any further depositions. Defendants then filed this motion for immediate dissolution of the TRO. In response to the motion to dissolve the restraints plaintiff has hastily bundled to-

gether a mass of documents and depositions acquired thus far in discovery and has submitted these papers on April 28, 1986 in support of a preliminary injunction.

Defendants have submitted no proofs in opposition. They rely primarily on the act-of-state doctrine, the immunity of President Marcos under Philippine law, the Foreign Sovereign Immunity Act of 1976, 28 U.S.C. §§ 1602 *et seq.*, the principle of *forum non conveniens* and the contention that plaintiff's proofs are conjectural and insufficient.

In order to qualify for preliminary injunctive relief in this Circuit, plaintiff must show "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Jackson Dairy* v. *Hood,* 596 F.2d 70, 72 (2d Cir. 1979). Considering all the proofs and circumstances, I find that the Republic of the Philippines has sufficiently supported its position to satisfy the requirements of law. It has demonstrated entitlement to a preliminary injunction.

I. *Background*

Joseph Bernstein testified that in mid-1981 he began buying and subsequently managing New York commercial properties for undisclosed owners fronted by a Mrs. Gliceria Tantoco, a Philippine national and close friend and business associate of the Marcoses. During the next two years, he arranged for the purchase by the Tantoco interests of the Crown Building at 730 Fifth Avenue (called the Genesco Building at the time of purchase), 40 Wall Street, and the Herald Center Building (formerly E.J. Korvettes) at 34 Street and 6th Avenue. Subsequently

he competed for but did not win the opportunity to act as agent for the Tantoco interests in their purchase of 200 Madison Avenue.

Bernstein set up or caused to be set up two tiers of offshore corporate vehicles for the acquisition and ownership of the three commercial properties as follows:

The Crown Building was purchased in September 1981 in the name of Lastura Corporation, N.V., a Netherland Antilles corporation, now called the Canadian Land Company of America, N.V. Joseph Bernstein served as director from 1982-84. Its shares were held by two Panamanian companies issuing bearer shares: Trade and Commodities, S.A. and Yewell Compagnia Immobiliera.

Herald Center was purchased in February 1981 in the name of a British Virgin Islands corporation named Voloby, Ltd. (now called Herald Center, Ltd.). Bernstein served as its sole director. Its shares were held by three Panamanian corporations issuing bearer shares: Bedner Development Corp., Compral Investment, S.A. and Dicet Finance Investment Corp.

40 Wall Street was purchased in December 1982 in the name of an Antilles corporation now called Nyland (CF 8), Ltd. (formerly Ainesville, N.V.). Bernstein served as one of its 3 directors after Tantoco directed him to establish the corporation in 1982. It is owned by three Panamanian corporations issuing bearer shares: Beneficio Investment Incorporated, Bueno Total Investment Incorporated and Excelencia Investment Incorporated.

Although Bernstein did not succeed in representing the Tantoco group in their purchase of 200 Madison Avenue he testified that he was familiar with the situation, and had competed for the right to act as manager. In the fall of 1983, 200 Madison Avenue was acquired in the name of Glockhurst Corporation, N.V., a Netherland Antilles corporation. Bernstein, who established the three Pana-

manian corporations named above (Bender, Compral and Dicet) to hold the shares of Voloby and served as their attorney, testified that he believed the shares of Glockhurst had been transferred by Mrs. Tantoco to those corporations.

The acquisition of the Lindenmere Estate in Long Island, New York was not handled by Bernstein and does not appear to involve Mrs. Tantoco. It was purchased by Philippine interests in February 1981 in the name of Luna 7 Development Corp. Later it was transferred to its present owner, Ancor Holdings, N.V., a Netherlands Antilles corporation. Augusto Camacho, Lindenmere's architect, was President and a 10% stock owner of Luna. Ancor has one corporate and two individual directors, one of whom in Antonio O Floirendo, a friend and business associate of the Marcoses.

II. *Evidence on the Merits*

The two general areas to which the plaintiff's proofs must be addressed are that President and/or Mrs. Marcos are beneficial owners of the Properties and that their acquisition of the Properties was with funds converted from the Republic of the Philippines.

A. *Evidence of Ownership*

The evidence of Marcos ownership of the Properties arises from actions and statements of the Marcoses supporting an inference of ownership, and from a great number of documents, many found in the Malacanang Palace immediately after their departure on February 25, 1986. Although the evidence produced thus far certainly falls short of conclusively demonstrating Marcos' ownership of the Properties, it is more than sufficient to raise fair ques-

tions for litigation, as required by the *Jackson Dairy* standard.

1. *Behavior Suggesting Ownership*

The evidence shows numerous instances in which President and Mrs. Marcos acted in a manner suggesting an ownership interest in the Properties:

Joseph Bernstein testified that in mid-1981 he began to discuss with Mrs. Tantoco the possible acquisition of the Crown Building by undisclosed principals. Shortly after the acquisition was concluded, Bernstein met with Mrs. Tantoco and Mrs. Marcos who then took an active role in discussing plans for the building.

Peter W. Williams, an attorney with the law firm of Rogers and Wells, testified by affidavit (made at the request of the U.S. House Subcommittee on Asian and Pacific Affairs) describing his firm's involvement with several of the record holder defendants. Williams testified that his firm was retained in September 1981 by Banque Paribas (Suisse) to act for undisclosed clients of Paribas engaged in the purchase of the Crown Building (730 Fifth Avenue). As the acquisition vehicle, he formed the defendant Lastura Corp., N.V., a Netherlands Antilles company (now named Canadian Land Company of America, N.V.). The purchase of the building was consummated on September 30, 1981. Two weeks later, at the request of Mr. Cattaui, his contact at Paribas, Mr. Williams travelled with him to Honolulu and there met with Ferninand Marcos. Again two weeks later, he accompanied Mr. Cattaui to a meeting in New York with Imelda Marcos. At the meeting Mrs. Marcos discussed with Mr. Cattaui plans for the renovation of the building. Mr. Williams testified that he understood he "was asked to attend the meeting to respond to any legal questions in connection with the pur-

chase of the Crown Building. . . ." In mid-1982 the legal representation of Lastura was transferred from Rogers & Wells to the law firm of Bernstein, Carter and Deyo, Joseph Bernstein's firm.

An official of the Philippine National Bank who had ties with President and Mrs. Marcos and was knowledgeable about New York business, testified by affidavit that he was "contacted by Mr. and Mrs. Marcos for my views and opinions on real properties in New York . . . I specifically remember a telephone conversation with Mr. Marcos in the fall of 1981 . . . regarding . . . the Crown building. . . . I gathered the impression that Marcos was interested in the Crown Building." In late 1981 and early 1982 Mrs. Marcos questioned him about the 40 Wall Street property. Bernstein testified further that in March 1982 President Marcos asked him for advice about structuring a $34 million loan from Paribas Suisse to the Lastura Corporation (the record owner of the Crown Building). (Bernstein Dep. at 208-09; Bernstein House Testimony, at 35-37.)

Bernstein also testified that in April 1982 Roland Gapud, who was a business advisor of President Marcos, dictated to him a declaration of trust by which Bernstein would undertake to serve as trustee for the benefit of Ferdinand Marcos for all matters concerning the Lastura Corp., N.V. The dictated draft of the trust deed provided furthermore that Bernstein as trustee, with respect to the shares of Lastura, was to act in accord with the instructions of President Marcos. (Salonga dep. at 33-35 and Bernstein dep. at 42-44.)

Bernstein testified that throughout the course of his activities in acquiring and managing subject Properties he has understood and believed that the Marcoses were the owners of Crown, 40 Wall Street, Herald Center, and 200 Madison Avenue.

Among the factors on which he based his belief were a number of instances in which Imelda Marcos acted in a manner suggesting ownership, including the following:

(1) Mrs. Marcos, and at times her staff, generally attended meetings concerning the financing and commercial status of the Manhattan properties; meetings were often held in her New York hotel rooms, in Manila or at the Philippine Consulate in Manhattan; "she [was] making the decisions" at these meetings; (2) Mrs. Marcos gave the orders at the meetings and told Mrs. Tantoco "what should be done" with the Crown building and other properties; (3) shortly after the signing of the contract for the purchase of 40 Wall, Mrs. Marcos expressed a desire to Bernstein and Mrs. Tantoco to go see the building. They went together to look at it, whereupon, Bernstein testified, "Mrs. Marcos said it was a nice building. To me it appeared she seemed to be proud of it"; (4) during a 1984 meeting about the financing of the commercial properties, held at the Philippine Consulate and attended by Mrs. Marcos, members of her staff, Bernstein, Tantoco, Gapud, and Barry Knox, a financial adviser to the owners of the Properties, Mrs. Tantoco asked Mrs. Marcos if $10,000,000 was available for investment in developing the 40 Wall Street property. Mrs. Marcos replied to the effect that there was no money, but, responding to a prior suggestion that 40 Wall be sold, Mrs. Marcos had said that "the properties wouldn't be sold." At a later meeting again attended by Mrs. Marcos, Bernstein, Tantoco and Gapud to discuss further the need for an infusion of $10 million capital for development of 40 Wall Street, Mrs. Marcos asked Gapud, "Do we have $10,000,000?" When he responded in the affirmative, Mrs. Marcos directed Gapud to give Mrs. Tantoco $10,000,000. (Bernstein dep. at 23-38.)

2. *Documents Suggesting Ownership*

A variety of documents, including bank records, reports, financial statements, receipts and personal written communications, which the Republic of the Philippines advises were found at the Marcoses' residence at Malacanang Palace immediately after their hasty departure in February, support the inference of a Marcos ownership interest in the five Properties. Among such documents are the following:

(a) A memorandum from Gliceria Tantoco addressed "To the Beneficial Owners of Canadian, Voloby, Nyland and Glockhurst" regarding "Repayment of Current Personal Debts Through Financing From the Future Earnings of Real Estate Properties." This memorandum discusses the possibility of raising $16.8 million (to be used for repayment of personal debts) by taking a new third mortgage on 40 Wall Street. The memo observes that a consequence of such a borrowing "would be to eradicate the cash flow to the owner . . . for the period 1984 to 1991." The memo goes on to observe that the "acquisition of [200 Madison by Glockhurst Corp.] . . . is planned to be achieved purely through borrowing (by Canadian [the record holder of Crown] and Glockhurst). . . ."

(b) "New York Real Estate Accounts Summary Report" memorandum describing the equity investments in 40 Wall Street, the Crown Building and Herald Center. This is a 9 page detailed analysis of the financial condition of Voloby (record holder of Herald Center), Nyland (record holder of 40 Wall), and of Canadian Land Co. (record holder of Crown).

(c) A report detailing the use of a $37.5 million dollar loan from Citibank to Nyland Corporation (40 Wall

Street), indicating Nyland's use of the funds to make loans to Canadian Land Company, Voloby and Glockhurst.

(d) A handwritten accounting was found in Gimenez's Malacanang Palace files showing the following entries:

$5.5 million	—	Tantoco
$9.5 million	—	Voloby
$6 million	—	Floirendo
$4.3 million	—	Blackhurst (sic) 11/4/83
$25.3 million	—	Total.

(Senator Salonga in his deposition expressed the belief that this was an accounting by Vilma Bautista to Fe Gimenez. Regardless whether Senator Salonga is correct and regardless whether he has a proper evidentiary basis for this option, the simple fact that such an accounting was found in Fe Gimenez's files at the Marcos residence gives support to plaintiff's contention.)

(e) A receipt for 3 Voloby stock certificates (former record owner of Herald Center) handwritten on official Malacanang stationary, was found in the Palace. The receipt states that the shares were "to be given to Rico Tantoco," (Gliceria's son).

(f) A single page handwritten sheet detailing various financial figures relating to Voloby Ltd. and the operation of the "Korvette Building" [as Herald Center was formerly known].

(g) A handwritten memo on printed memo form of New York Land Company (the Bernsteins' company) addressed to Mrs. Marcos' personal secretary Fe Gimenez reporting on "leases signed to date" for the Herald Center building.

* * *

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Glockhurst [recordholder of 200 Madison] claims there is no evidence that it is owned by the Marcoses. The claim is without merit. While it is true there is little evidence of actions of President or Mrs. Marcos respecting 200 Madison, there is considerable documentary evidence of common ownership of the four Manhattan commercial Properties. A number of these documents are discussed in the preceding paragraph. For example: (a) Mrs. Tantoco's memorandum addressed "To the Beneficial Owners of Canadian, Voloby, Nyland and Glockhurst" carries a strong inference of common ownership and states that 200 Madison is to be acquired by Canadian's borrowing on the Crown Building; (b) the one page memorandum on "Uses of the $37.5 loan from Citibank for Nyland" shows that a borrowing by the record holder of 40 Wall was to be used in part as payments for the record holders of Crown, Herald Center and 200 Madison.

Lengthy detailed periodic financial analyses of the four Properties prepared for their owners by Barry Knox and disclosed in discovery by the attorneys for Crown, 40 Wall and Herald Center, treat the four Properties, including 200 Madison, as a joint and interdependent economic enterprise.

Joseph Bernstein has testified that he believed the shares of Glockhurst are held by the same three Panamanian corporations as hold the shares of Voloby [Herald Center]. Bernstein is attorney for those three Panamanian companies. He testified further to his belief that Mrs. Marcos had an interest in all four Properties and that, among the four, "there was never a distinction between the one and the other when I was involved." (Bernstein dep. pp. 37, 158-60.)

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Lindenmere

Although the evidence with respect to Lindenmere is less compelling than with respect to the Manhattan commercial properties, it is sufficient to meet the *Jackson Dairy* standard.

The following documents were found in Fe Gimenez's files at the Palace:

(a) An accounting of checks issued by Fe Gimenez in May 1982, including a $119,-149.89 item on May 1, 1982 for "Lindenmere" (Salonga Ex. 7).

(b) Handwritten list of Lindenmere expenses, including entries for monthly telephone, electric and housecleaning expenses as well as monthly real estate taxes. The Lindenmere housekeeper, Emily Austin, is listed by name along with payments to her. (Salonga Ex. 8.)

(c) The word "Lindenmere" appears on a handwritten list found in Fe Gimenez's files at the Palace, together with: "66th" (66th Street Philippine Townhouse); "Princeton" (Marcoses' owned property near Princeton University); "Cherry Hill" (location of property alleged owned by Marcoses) and "Vilma" (Mrs. Marcos's secretary Vilma Bautista in the United States). (Salonga Ex. 8).

(d) Augusto Camacho, the Lindenmere architect and originally a shareholder in the property, testified that Mrs. Marcos used Lindenmere on several occasions, bringing twenty or thirty guests with her. Camacho further testified and submitted documents showing that he submitted statements of account that covered both his work on the Lindenmere property and the Philippine government townhouse on 66th Street to Mrs. Marco's New York secretary Vilma Bautista. He stated that to the best of his knowledge, he was "receiving funding from the same source"

for his work on the two properties. In addition, Camacho complained to Mrs. Bautista about delinquency in paying his architectural fees for Lindenmere, after which he received $150,000 from the Bernstein law firm. He also complained to Bautista that when the Lindenmere property was transferred from Luna 7 Corp., of which he was a shareholder, to Ancor Holdings, he had received no consideration. After he had brought suit on these claims in January 1984, he was offered $850,000 in settlement by Fe Gimenez, Mrs. Marco's personal secretary.

(e) Antonio Floirendo, one of the two managing directors of Ancor Holdings, N.V. (record holder of Lindenmere) and alleged by Ancor to be the beneficial owner of Lindenmere, received a $500,000 loan from the Philippine National Bank in February 1979 and in July 1982 was asked by Mrs. Tantoco to give Joseph Bernstein $600,000 for Herald Center.

B. *Evidence of Illegality*

Documentary and testimonial evidence submitted by the plaintiff gives support to the contention by the Republic of the Philippines that Ferdinand and Imelda Marcos misappropriated funds of the Republic, and that they have used such misappropriated funds in connection with the New York Properties. Among plaintiff's evidence is the following:

In a memorandum found at Malacanang Palace on letterhead of the "Philippine National Bank—Official Depository of the Philippines," the President of the Bank requests the approval of President Marcos concerning the "Philippine Intelligence Fund" as follows:

> May I request your approval to charge *temporarily* against Accounts Receivable (Office of the President)

the unliquidated advances from our New York Branch totalling US$9,805,371.98.

Disposition of the receivable will subsequently be made from the Philippine Intelligence Fund *to be provided out of PNB* [Phillipine National Bank] *profits when the income or profit position of PNB can absorb it.* (Emphasis added.)

The request appears to be approved by President Marcos' signature. Attached to the memorandum is a list specifying 114 items from the period 1976-1982 totalling $9,805,371.98. An apparently related document captioned "Float Items in the PNB New York," includes in Schedule A all the transfers reported in the Philippine Intelligence Fund document described above, as well as in Schedule B, a listing of 67 items totalling an additional $8,274,326.94 described as "Total Lodged to AR—Office of the President." Also attached is a Schedule B-1 with 23 items amounting to $5,503,368.15 described as "Fund Transfers and Various Disbursements per Request/Instruction of Ms. Fe Roa Gimenez Lodged to AR—Office of the President," Schedule B-2 including 8 items amounting to $1,350,242.13, Schedule B-3 including 37 items amounting to $1,420,716.63, and a Schedule C with 7 entries totalling $1,414,260.81.

A fair inference of these documents is that the listed payments (discussed below amounting to many millions of dollars) were made out of funds of the official depository of the Philippine Republic, through the so-called Special Intelligence Fund, "temporarily" charged to "Accounts Receivable—Office of the President" to be eventually covered by the profits of the Philippine National Bank. The list indicates that the great bulk of the payments were made to, or at the direction of Mrs. Marco's personal sec-

retaries. The list furthermore indicates that many payments were for the personal benefit of the Marcoses, including payments related to the Properties at issue.

Included in the list of "advances" are:

a) $300,000 to the account of Voloby, Ltd. at Irving Trust, dated June 1, 1982. [Voloby is the record owner of Herald Center.]

b) Numerous transfers in 1977 and 1978 to "Princeton" and the "Princeton Univ. Store."

c) Transfers exceeding $3 million to accounts of Fe Gimenez [personal secretary to Mrs. Marcos].

d) Countless disbursements exceeding $6 million listed merely as "per instruction Fe Gimenez."

e) Payments made to Mrs. Vilma Bautista [Mrs. Marcos secretary in New York] exceeding $450,000.

f) A transfer of $500,000 to Antonio Floirendo on February 9, 1979. [Mr. Floirendo is a managing director of Ancor Holdings, N.V., the record owner of the Lindenmere property.]

g) Transfer of more than $100,000 to Gliceria Tantoco.

h) Payments to Princeton University exceeding $5000 and an additional payment of $1500 "to Princeton Party."

A photocopy of a September 1975 check for $4767.75 drawn on the Philippine National Bank and payable to Princeton University includes the hand-written notation: "Maria Marcos '77."

Further evidence is provided by an affidavit (Exh. C) of an official of the New York Branch of the Philippine National Bank who testified that officials of the bank "would issue official checks of the Bank, deliver cash or cause the transfer of funds into the accounts of persons designated by Mrs. Gimenez." The affiant believed that these disbursements were "outside the regular banking business practice of the Branch. . . ." While "[m]ost of the payments were made to Mrs. Gimenez," official bank checks would "occasionally" be issued in the name of Mrs. Vilma Bautista. Some of the transfers to Mrs. Gimenez were made to an organization established by bank officials, "Oscarmen Holdings, Ltd."

Documents appended to the affidavit include:

a) A hand-written confirmation on Philippine National Bank stationary of "FL's" [First Lady, Imelda Marcos] instructions to transfer one million U.S. dollars to Continental Bank in Chicago, Illinois

b) A July 1982 check payable to Antonio Floirendo [managing director of Anchor Holdings, N.V.] for $500,000 drawn against "Accounts Receivable" of the Philippine National Bank.

C. *Defendants' Obstructive Conduct*

Defendants have effectively obstructed plaintiff's efforts to obtain discovery for the preliminary injunction hearing. This conduct is perhaps most evident in their repeated refusal to comply with plaintiffs' lawful discovery demands, despite court order for expedited discovery. This conduct warrants the drawing of negative inferences against them. Rule 37, Fed.R.Civ.P. A few examples of defendants' conduct follow:

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At defendants' request and with plaintiff's consent, the deposition of Joseph Bernstein, originally scheduled to begin March 21, 1986 was postponed for almost one month. The deposition finally began on April 17 and was scheduled to continue the next day, but Bernstein's attorney cancelled the deposition on April 18 claiming the "public nature" of the deposition was inappropriate. On April 18 I ruled as to the issue of public testimony and ordered the continuation of the deposition. Depositions were then rescheduled for April 21 but on that day after a very brief session Bernstein's attorney, Mr. Silverberg, directed him not to testify. Mr. Silverberg advised plaintiff he would move to dissolve the TRO and would not produce Bernstein again until the motion was decided. Bernstein has not reappeared to date.

The deposition of Glockhurst Corporation (record owner of 200 Madison Avenue) was scheduled for the week of April 21. Glockhurst refused to produce a representative until the court had ruled on the motion to dissolve.

Philip Carter, Esq., a partner of the law firm of Bernstein, Carter and Deyo and attorney for defendants Canadian (Crown Building), Herald Center and Nyland Ltd. (40 Wall Street) refused to produce his partner William Deyo for depositions until decision of the motion to dissolve the TRO. He also refused to respond to deposition notices served on defendants Canadian Land Company, Herald Center and Nyland Ltd.

Ancor Holdings (record holder of Lindenmere) failed to produce Antonio Floirendo, one of its managing directors, producing instead Diosado Ordonez, an Ancor agent. Floirendo is clearly a necessary witness on behalf of Ancor and the only Ancor representative capable of answering plaintiffs' inquiries. Floirendo is alleged by Ancor to be

its beneficial owner. Floirendo also has a personal relationship with President Marcos and, according to Malacanang Palace documents, received substantial payments from Fe Gimenez. Ancor's claim it does not know Floirendo's whereabouts is unconvincing and insufficiently substantiated. Furthermore, at Ordonez's deposition, he was directed by Ancor's counsel not to answer plaintiff's questions seeking the whereabouts of Floirendo.

The fact that the defendants were moving to vacate the TRO, or even that the TRO was extended beyond the allowable time, is no conceivable justification for their refusal to furnish discovery to the plaintiff, especially after the court had directed the conduct of expedited discovery. Even if the TRO had been dissolved, the defendants would nonetheless have remained under obligation to produce lawfully demanded discovery. The defendants' united withholding of discovery was a blatant effort to obstruct plaintiff's efforts to obtain information to support its claims. Such conduct clearly warrants the court in drawing inferences against the defendants under Rule 37(b) and (d), Fed.R.Civ.P. This further bolsters those inferences already adequately supported by plaintiff's evidence.

Plaintiff's entitlement to preliminary injunctive relief is further supported by the fact that the Marcos defendants remain at present in default. If the court would be legally entitled to enter judgment against them by default, it can surely take the lesser step of ordering a preliminary restraint temporarily maintaining the status quo. Furthermore, their failure to appear has, of course, prevented the Philippine Republic from obtaining discovery of them.

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III. *Irreparable Harm and Balance of Hardships*

The *Jackson Dairy* test requires the applicant for a preliminary injunction to show irreparable injury and a balance of hardships tipping decidedly in his favor. Plaintiff has made strong showing of irreparable harm. If the restraints are dissolved, the Properties could pass quickly out of the plaintiff's reach through transactions involving the various tiers of offshore holding companies, which are shrouded in secrecy. Alternatively, the Properties could be sold with the proceeds delivered out of the country and beyond plaintiff's reach. Indeed, an arrangement to sell the Herald Center and 40 Wall Street properties to Joseph Bernstein was prevented by the issuance of this temporary restraining order. (Williams Aff. ¶ 12.) Denial of a preliminary injunction would effectively deprive the Republic of any hope of protecting its claim to ownership of the Properties.

As to the balance of hardships, while the harm risked by plaintiff is enormous, defendants have shown far less harm on their side. As to the three Bernstein Properties, the defendant corporations acknowledge that they are merely nominess for undisclosed owners. None of the defendants have made any compelling demonstration of hardship resulting from the restraints. The Bernstein companies, Glockhurst, and Ancor have all violated this court's orders for the provision of discovery. The Marcos defendants are in default. These defaults and refusals to provide properly demanded disclosure justify the drawing of inferences against the defendants. As to the issue of comparative harm, such inferences are scarcely necessary. The plaintiff has shown serious harm if the preliminary injunction is denied; the defendants have shown no significant harm if it is granted. Most importantly, the restraints have

been and will continue to be carefully tailored to permit the defendants the maximum benefit of profitable operation while maintaining the status quo. Thus, the costs of the restraint, if any, are slight in comparison with the hardship that plaintiff would suffer from dissolution of the restraints. The balance of hardships tips decidedly in plaintiff's favor.

IV. *Legal Defenses*

The defendants invoke the act-of-state doctrine and *forum non conveniens,* contending that these defenses will ultimately require dismissal and now require that the restraints be lifted. It is indeed possible that the act-of-state doctrine may eventually prove an obstacle to the plaintiff's case. But the applicability of the doctrine is not demonstrated on the present record. Defendants have made no showing that the acts alleged against Ferdinand Marcos, much less Imelda Marcos, would necessarily be protected from United States court adjudication. The doctrine generally does not protect foreign officials from adjudication as to personal acts of conversion that do not purport to be done in the name of the foreign sovereign.

As the doctrine was recently explained by the Court of Appeals: "If adjudication would embarrass or hinder the executive in the realm of foreign relations, the court should refrain from inquiring into the validity of the foreign state's act." *Allied Bank Int'l* v. *Banco Credito Agricola,* 757 F.2d 516, 521 (2d Cir. 1985). This court has received neither an indication from the Department of State, nor even argument from the defendants, that this government's conduct of its foreign policy would be hindered or affected by judicial consideration of plaintiff's claims. Unlike the usual case of application of the doctrine in which the for-

eign state defends its acts against U.S. court intrusion, *see, e.g., Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964); *Underhill* v. *Hernandez,* 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456 (1897), here, by contrast, it is the foreign government that seeks adjudication in our courts. There is no effort to declare invalid acts asserted to be legal by a foreign state.

The act-of-state doctrine "demands a case-by-case analysis." *Allied Bank Int'l, supra,* at 521. On the incomplete record before the court at this stage, and bearing in mind the great hardship to the plaintiff of any dissolution of the restraints, the mere possibility that the doctrine may later prove a viable defense is not sufficient grounds to block the issuance of an otherwise appropriate preliminary injunction.

Defendants further contend that principles of *forum non conveniens* require dismissal, or denial of a preliminary injunction. The Supreme Court explains "the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient. . . ." *Piper Aircraft* v. *Reyno,* 454 U.S. 235, 256, 102 S.Ct. 252, 266, 70 L.Ed.2d 419 (1981). While it is true that much of the evidence is to be found in the Philippines, the action focuses on New York properties and plaintiff's application for a New York receiver. Numerous pertinent financial documents are in New York. The likelihood of dismissal based on *forum non conveniens* is not sufficiently high to justify denying preliminary restraints necessary for plaintiff's protection. Indeed, even if the action were to be dismissed in favor of a parallel trial in the Philippines, such dismissal might await the Philippine Court having the opportunity to consider ordering similar preliminary restraints.

Defendants also have raised a defense based on the Court of Appeals' decision in *Republic of Iraq* v. *First*

National City Bank, 353 F.2d 47 (2d Cir. 1965). In *Republic of Iraq* the court affirmed federal jurisdiction and dismissed the action on the grounds that an Iraqi decree confiscating the properties of the deposed sovereign was inconsistent with United States law and would not be enforced in United States courts. Defendants' proposition that the *Republic of Iraq* case requires dismissal of the instant action is at best premature. The Philippine government has done nothing inconsistent with the policies or laws of the United States.

The record holders of the Manhattan Properties raise the additional defenses that President Marcos is immune from suit under Philippine law (in particular a 1981 amendment to the Philippine Constitution) and is further protected by the Foreign Sovereignty Immunity Act of 1976, 28 U.S.C. §§ 1602 *et seq.* Without reaching the merits of these defenses, it is sufficient to say that Mr. Marcos has not appeared in this action, but that none of the appearing defendants is entitled to raise either defense on his behalf.

Conclusion

I recognize that the evidence on which this opinion relies is susceptible of other conceivable interpretations, perhaps wholly consistent with innocent explanations. At present, however, no proofs have been submitted to rebut the inferences on which plaintiff relies. Indeed, as mentioned above, President and Mrs. Marcos as of this time are in default. It should be noted that a ruling on a preliminary injunction is not a fact finding. This opinion does not conclude that any facts have been established. It concludes only that the standards for issuance of a preliminary injunction have been satisfied. Plaintiff has amply shown "sufficiently serious questions going to the merits to make

them a fair ground for litigation" together with irreparable harm and a balance of hardships tipping in its favor.

The preliminary injunction is granted on the same terms as the expiring temporary restraining order. Plaintiff is directed to post a bond of $3 million.

So Ordered.

APPENDIX C

Opinion and Order of United States District Court Dated June 26, 1986

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

86 Civ. 2294(PNL)

Re: Federal Question Jurisdiction

THE REPUBLIC OF THE PHILIPPINES,

Plaintiff,

—against—

FERDINAND MARCOS and IMELDA MARCOS, et al.,

Defendants.

APPEARANCES

PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON
40 West 57th Street
New York, New York 10019

Michael J. Silverberg, Esq.
Of Counsel

Attorneys for Petitioners
Joseph and Ralph Bernstein and
New York Land Company

BERNSTEIN, CARTER & DEYO
29 West 57th Street
New York, New York 10019

Philip Carter, Esq.
Of Counsel

Attorneys for Petitioners Canadian
Land Company of America, N.V.,
Herald Center, Ltd., and Nyland (C F 8) Ltd.

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ROSENMAN COLIN FREUND LEWIS & COHEN
575 Madison Avenue
New York, New York 10022

Gerald Walpin, Esq.
Lawrence G. Golde, Esq.
Of Counsel

Attorneys for Defendant Ancor Holdings, N.V.

GOLENBOCK, EISEMAN, ASSOR, BELL & PERLMUTTER
230 Park Avenue
New York, New York 10169

Jeffrey T. Golenbock, Esq.
David J. Eiseman, Esq.
Of Counsel

Attorneys for Glockhurst Corp., N.V.

JAMES DREW AND ASSOCIATES
1130 17th Street, N.W., Suite 300
Washington, D.C. 20036

Severina Rivera, Esq.
Of Counsel

CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway
New York, New York 10012

Morton Stavis, Esq.
Peter Weiss, Esq.
Franklin Siegal, Esq.
Juan Saavedra-Castro, Esq.
Of Counsel

Attorneys for Respondent

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PIERRE N. LEVAL, U.S.D.J.

In all cases in the federal court, it is incumbent on the court to determine whether the action comes within its subject matter jurisdiction.

The Republic of the Philippines initiated this action in the courts of the State of New York. It was removed by the defendants to the federal court. Plaintiff then moved for its remand to the State court.

Upon the filing of the complaint the State court had issued a temporary restraining order barring transfer of certain buildings in the defendants' possession that are alleged to be the property of defendants Ferdinand and Imelda Marcos. That TRO was continued in modified form after removal. Defendants consented to its continuation beyond the period provided by Rule 65(b) while plaintiff undertook discovery. The issue of plaintiff's motion for remand was temporarily forced aside by defendants' abrupt withdrawal of consent to the prolongation of the TRO, in effect demanding the immediate release of the properties.

A hearing on plaintiff's motion for a preliminary injunction was held at which plaintiff submitted the proofs accumulated to date through discovery and through investigation in the Philippines. Plaintiff's success in discovery, had been limited by the refusal of the defendants to proceed with depositions and by the default of the Marcos defendants. Nonetheless, the evidence accumulated by plaintiff was considerable. This court ruled that the force of plaintiff's evidence, together with a balance of hardships tipping overwhelmingly in plaintiff's direction, amply justified maintaining provisional restraints on transfer. It was apparent that a lifting of the restraints would have immediately mooted the action, defeating any possibility for the plaintiff of eventual recovery, as the owner-

ship of the properties would have been transferred to undisclosed foreign interests. Maintenance of a provisional restraint, on the other hand, interfered only minimally with the beneficial enjoyment of the properties. Even if sale were contemplated, this could easily be done with court approval upon reasonable assurance that the transaction was arm's length at a fair market price with plaintiff's security transferred to the proceeds. A preliminary injunction was accordingly granted.

The defendants took appeal from the grant of preliminary injunction which is pending decision in the Court of Appeals.

Plaintiff thereafter advised that it expected to withdraw the motion seeking remand to the State court. Remand is, therefore, left without a sponsor among the parties—the defendants having removed the case and advocated a finding of federal jurisdiction and plaintiff having apparently conceded the issue after initial opposition.

The apparent consensus of the parties does not, however, moot (or even affect) the issue. Federal jurisdiction cannot be conferred by agreement of the parties. If there is no federal subject matter jurisdiction, the federal court is required to remand the case to the state court where it was filed, notwithstanding unanimous wishes of the parties to have it remain here.

I do not think the issue of federal jurisdiction is open to serious doubt. The authorities cited by the defendants supporting removal establish clearly that this is a case "arising under the Constitution, laws or treaties of the United States" and is therefore within the federal question jurisdiction. 28 U.S.C. § 1331.

Whether a case is to be deemed to arise under federal law is to be judged by analysis of the complaint. The likelihood (or inevitability) that federal law matters will

be raised in the answer or some subsequent pleading does not bring a case within the federal question jurisdiction. *Louisville & Nashville R.R.* v. *Motley,* 211 U.S. 149, 152 (1905). It is the complaint whose resolution must involve issues of federal law. On the other hand, the complaint to be examined for this purpose is not necessarily the complaint in the form the plaintiff has drafted. The doctrine instructs the court rather to conjure up and analyze the "well-pleaded complaint" to determine whether it relies on any doctrine of federal law. The well-pleaded complaint may be seen as a Platonic ideal of the complaint actually filed. (Leave to amend the complaint is, in any event, freely granted.) The point of the doctrine is that the original jurisdiction of the federal court to adjudicate cases arising under federal law will not be defeated by confusion or artlessness on the part of a plaintiff nor by drafting which intentionally conceals the federal law questions necessary to resolution. *See North Am. Phillips Corp.* v. *Emery Air Freight,* 579 F.2d 229, 233 (2d Cir. 1978) ("the lack of any reference in the complaint to federal law is not controlling"). What the court must analyze is the *theory* of the complaint, rather than its form, to determine whether it depends on enforcement of a provision of federal law. *See Calhoon* v. *Bonnabel,* 560 F.Supp. 101, 104 (S.D.N.Y. 1982) ("the essence of the controversy must be determined from the perspective of the plaintiff").

The theory on which the complaint relies is summarized as follows:

> Using his role and influence as president of the Philippine Republic during 20 years, Ferdinand Marcos illegally acquired moneys and properties of the Republic which he and his wife invested for their personal use. Among their investments acquired with

such moneys are five buildings in the State of New York.

The new Government by Executive Decree No. 1 has established a Commission on Good Government to study the facts and legal procedures and initiate proceedings in the Philippines that will result in lawful Philippine decrees and judgments seizing such properties.

In the meantime by Executive Decree No. 2 the Government has decreed a provisional freeze on the Marcos assets and requests foreign governments to honor the freeze so as to preserve its ability to eventually effectuate the ultimate decree or judgment of seizure.[1]

This action asks the American court to honor the decree imposing a provisional freeze and to honor the eventual Philippine decree or judgment of confiscation against the five buildings.

The enforceability by United States courts of a foreign government's decree of confiscation of property for many years has been recognized to be a question of federal law. It is a question that affects the United States in its international relations and one which requires application of a uniform law throughout the nation (as opposed to differing resolutions depending on the state where the subject property is found). When a *complaint* asks a United States court to enforce such a decree, the action is within the federal question jurisdiction. *See Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972).

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[1] The fact that Executive Decree No. 2 was issued subsequent to the filing of the complaint (although prior to the filing in federal court) does not make it any less a part of the theory of the relief sought by the complaint.

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In *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 427, 84 S.Ct. 923 (1964), plaintiff, which owned rights to a cargo of sugar under a claim of title deriving from a Cuban Government decree of expropriation, had sold and delivered the sugar to defendant's assignor, which independently claimed ownership under a chain of title deriving from the victim of the expropriation and therefore refused to pay plaintiff under the contract. This court and the Court of Appeals had ruled in defendant's favor that it was the rightful owner based on a finding that the expropriation had violated international law and would therefore not be honored. The Supreme Court reversed ruling that, under principles of the "act of state" doctrine, a U.S. court would accept, without examination, the validity of such a foreign government decree confiscating property that was within the expropriating country at the time of the expropriation. More importantly for our purposes, the Supreme Court made clear that the question whether to give effect to such a foreign decree "must be treated exclusively as an aspect of federal law. . . . [T]he scope of the act of state doctrine must be determined according to federal law." 376 U.S. at 425, 427; 84 S.Ct. at 939, 940.

Two months after the Supreme Court's *Sabbatino* decision, Judge Henry Friendly noted in the publication of his lecture, *In Praise of Erie—And of the New Federal Common Law,* that in the *Sabbatino* case, "the Supreme Court has found in the Constitution a mandate to fashion a federal law of foreign relations." 39 N.Y.U.L.Rev. 383, 408 n.119.

The next year Judge Friendly further clarified the issue in a holding of the Court of Appeals where the Republic of Iraq sought to implement its decree confiscating the property of its former monarch by suing in this court for moneys and securities held by the New York administrator

of the deceased former king's estate. *Republic of Iraq* v. *First National City Bank*, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966). Judge Friendly wrote,

> The principal question reviewed on this appeal is the proper definition of the act of state doctrine and its application to foreign confiscatory decrees purporting to affect property within the United States. . . . A confiscatory decree . . . is the very archetype of an act of state. . . .
>
> The Supreme Court has declared that a question concerning the affect of an act of state "must be treated exclusively as an aspect of federal law." [Citing *Sabbatino*.] We deem that ruling to be applicable here even though, as we conclude below, this is not a case on which the laws of the forum are bound to respect the act of the foreign state. 353 F.2d at 50.

Judge Friendly's opinion goes on to explain that the question whether to enforce the act of a foreign sovereign affecting property in the United States "is closely tied to our foreign affairs, with consequent need for national uniformity. . . . [I]n dealing with other nations the country must speak with united voice. . . . It would be baffling if a foreign act of state intended to affect property in the United States were ignored on one side of the Hudson but respected on the other. . . . [A]ll questions relating to an act of state are questions of federal law, to be determined ultimately, if need be, by the Supreme Court. . . . [W]hen property confiscated is within the United States at the time of the attempted confiscation [unlike the situation in *Sabbatino*], our courts will give effect to acts of state 'only if they are consistent with the policy and law of the United States.'" 353 F.2d at 50-51. The Court proceeded to rule (for reasons which are not relevant to the

issue *now* before us, but undoubtedly will be disputed in the future of this case) that the Iraqi decree was not consistent with United States policy or law and would not be enforced.

Subsequent court decisions and commentaries have recognized the principle established by *Sabbatino* and *Iraq* that questions whether to give effect in American courts to confiscatory decrees or acts of foreign states are exclusively questions of federal law. *See Allied Bank International* v. *Banco Credit Agricola,* 757 F.2d 516 (2d Cir. 1985); *Banco De Espana* v. *Federal Reserve Bank,* 114 F.2d 438 (2d Cir. 1940) (prior to *Sabbatino* but consistent with its holding); *Bandes* v. *Harlow & Jones,* 570 F.Supp. 955 (S.D.N.Y. 1983). *See also* Note, *The Federal Common Law,* 82 Harv. L. Rev. 1512, 1520-21 (1969); Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino,* 64 Colum. L. Rev. 805, 815 (1964); *Restatement of Foreign Relations Law of the U.S.* (Revised), § 469 [428] at 669-71, comment b (Tent. Final Draft 1985).

The pertinence of the *Sabbatino* and *Iraq* rulings to the present questions is clear: If the enforceability of a foreign confiscatory decree is exclusively a question of federal law, a suit that seeks enforcement of such a decree is a suit "arising under the Constitution, laws or treaties of the United States." *See* 13B Wright, Miller & Cooper, *Fed. Prac. & Proc.: Jurisdiction 2d* § 3563, pp. 60-61 (1984).

It is true that this case differs from *Iraq* in certain respects. First, in *Iraq,* federal jurisdiction, as pleaded by the complaint, was premised on diversity and not on a federal question. Of course, when the complaint was filed in March 1982, plaintiff's counsel could not have foreseen the Supreme Court's declaration two years hence in *Sabbatino,* or the Court of Appeals' ruling in his own case that the enforceability of a foreign sovereign's confisca-

tory decree is a question of federal law. It is, however, an unmistakable inference of Judge Friendly's reasoning, quoted above, that had the *Iraq* complaint relied on federal question jurisdiction instead of diversity, this basis of jurisdiction would have been sustained; *Iraq* was a suit to enforce an asserted federal right. A second difference is that in *Iraq* the confiscatory decree preceded the action, whereas here the confiscatory act of the Philippine State has not yet occurred, and indeed might not. That distinction may have bearing on various questions, but none on whether the question of enforceability is one of federal law, justifying the lodging of the action in federal court.

In any event, prior to the filing of the complaint in New York State court, the Philippine Government had already promulgated Executive Order No. 1 appointing the President's Commission on Good Government charged with the recovery of all ill-gotten wealth accumulated "by the former president"; and prior to the removal to federal court, Executive Order No. 2 had been promulgated "freez-[ing]" all assets of President or Mrs. Marcos in the Philippines, and appealing to foreign countries for the freeze of the Marcos assets. Thus, although no final confiscatory decree has been entered, the actions that have been taken are more than sufficient to satisfy the requirements of a case and controversy within the federal question jurisdiction.

In their briefs asserting federal jurisdiction, defendants contend that the *Iraq* ruling supports federal jurisdiction only as a means to prompt dismissal of the action. Their argument, although highly persuasive as to the existence of federal jurisdiction, misses the mark, or is in any event premature, on dismissal. *Iraq* does not hold that *all* foreign confiscations of property situated in the United States

are unenforceable. It holds rather that their enforceability turns on whether they are consistent with our policies and laws. That one was not. There is at present no basis for reaching any conclusion as to any Philippine action. If the Philippine Government proceeds expeditiously in accordance with its stated objectives, the question will arise at the appropriate time whether its decrees or judgments are consistent with United States law and policy.

Up to now the only questions before the court have been the issues of federal question subject matter jurisdiction and whether provisional relief in the form of a preliminary injunction should be entered, at small cost to the defendants, in order to preserve the court's ability to render a meaningful judgment in the future. Whether any confiscatory action of the Philippines will be entitled to credit in the United States courts is a question for another day. Whenever that question properly arises, it is clear it will be governed by federal law, within the original jurisdiction of the court under Section 1331 of the Judicial Code.

Defendants have also argued (although making no motion for relief) that principles of *forum non conveniens* require dismissal. This contention is frivolous. If this court were being asked to try allegations that over 20 years the former president of the Philippines abused his office and wrongfully took property of the Philippine Republic, a claim of *forum non conveniens* would be highly persuasive. *See Islamic Republic of Iran* v. *Pahlevi*, 464 N.Y.S.2d 487 (A.D. 1st Dept. 1983). But the complaint seeks no such relief. As noted above, it seeks the United States' recognition of a Philippine decree freezing and eventually confiscating property.

This court will not be asked to try the basic issues accusing President Marcos of unlawful takings. It might be required to adjudicate any dispute as to whether Marcos

is the owner of the New York properties. Some of the evidence on this issue appears to be in the Philippines; much is in New York. But as to core questions of unlawful taking and the rights of the Philippine Republic, the court's responsibility will be merely, as stated in *Iraq*, to determine whether the Philippine act or judgment of expropriation "is consistent with the laws and policies of the United States." While this responsibility may well require attention to the evidence and procedures on which the act of the Philippine State is based, it will not be a trial of the fundamental accusations.

On the motion for preliminary injunction some review of the evidence was necessary, at least because there has been as yet no Philippine decree of confiscation. The question of granting a provisional remedy to preserve the status quo, pending the eventual Philippine decree of confiscation, or alternatively of honoring the provisional Philippine freeze decree, required some review of the available evidence to determine whether the allegations were sufficiently substantiated to make such provisional relief fair and equitable. This in no way implies an intention on the part of the court to try the basic allegations of wrongdoing. As to final relief, evidence of wrongdoing will be reviewed only to the extent that this is appropriate as serving an inquiry whether the ultimate Philippine decree, if any, is consistent with the law and policy of the United States.

The contention of the defendants that this is not a convenient forum is untenable for another reason. The action is instituted here for only one reason: the buildings are here, and their nominal owners and managers are here. Courts in the Philippines are incapable of implementing any Philippine decree of judgment against the New York real estate. This action is ancillary for the purpose of

enforcing or implementing an eventual Philippine decree or judgment against real estate in New York. The contention of *forum non conveniens* is frivolous.

Given the presence of federal question jurisdiction, the removal by the defendants was justified; the action is properly before the federal court.

Dated: New York, N.Y.
June 26, 1986

So Ordered:

/s/ Pierre N. Leval
Pierre N. Leval, U.S.D.J.

APPENDIX D

Opinion and Order of United States District Court Dated July 7, 1986

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

86 Civ. 2294(PNL)

THE REPUBLIC OF THE PHILIPPINES,

Plaintiff,

—against—

FERDINAND MARCOS and IMELDA MARCOS, et al.,

Defendants.

APPEARANCES

PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON
40 West 57th Street
New York, New York 10019

Michael J. Silverberg, Esq.
Of Counsel

Attorneys for Petitioners
Joseph and Ralph Bernstein and
New York Land Company

BERNSTEIN, CARTER & DEYO
29 West 57th Street
New York, New York 10019

Philip Carter, Esq.
Of Counsel

Attorneys for Petitioners Canadian
Land Company of America, N.V.,
Herald Center, Ltd., and Nyland (C F 8) Ltd.

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ROSENMAN COLIN FREUND LEWIS & COHEN
575 Madison Avenue
New York, New York 10022

Gerald Walpin, Esq.
Lawrence G. Golde, Esq.
Of Counsel

Attorneys for Defendant Ancor Holdings, N.V.

GOLENBOCK, EISEMAN, ASSOR, BELL & PERLMUTTER
230 Park Avenue
New York, New York 10169

Jeffrey T. Golenbock, Esq.
David J. Eiseman, Esq.
Of Counsel

Attorneys for Glockhurst Corp., N.V.

JAMES DREW AND ASSOCIATES
1130 17th Street, N.W., Suite 300
Washington, D.C. 20036

Severina Rivera, Esq.
Of Counsel

CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway
New York, New York 10012

Morton Stavis, Esq.
Peter Weiss, Esq.
Franklin Siegal, Esq.
Juan Saavedra-Castro, Esq.
Of Counsel

Attorneys for Respondent

Appendix D—Opinion and Order of United States District Court Dated July 7, 1986

PIERRE N. LEVAL, U.S.D.J.

I

Defendants move to stay all further discovery pending the decision of the Court of Appeals on defendants' appeal from this court's grant of a preliminary injunction.

The reasons advanced for the relief are: that the decision of the Court of Appeals could dismiss the action; alternatively its decision might alter the scope and nature of discovery proceedings; and that, in any event, plaintiff has no need for discovery while protected by the existing preliminary injunction.

As to the likelihood of dismissal of the action by the Court of Appeals, defendants cite *Shaffer* v. *Heitner*, 433 U.S. 186 (1977) for its requirement of minimum jurisdictional contacts; *Islamic Republic of Iran* v. *Pahlevi*, 94 A.D.2d 374 (1st Dep't 1983), *aff'd*, 62 N.Y.2d 474 (1984) for dismissal based on *forum non conveniens;* and *Ope Shipping Ltd.* v. *Allstate Insurance Co.*, 687 F.2d 693 (2d Cir. 1982) for the inappropriateness of piercing the corporate veil beyond the property holding corporations.

Although these contentions would no doubt require careful attention if advanced in a proper manner on an adequate record, that has not been done. First, as to the principles of minimum jurisdictional contacts under *Shaffer* v. *Heitner*, such arguments belong to Ferdinand and Imelda Marcos, who are in default—not to these defendants. No motion to dismiss has been made based on the *Shaffer* principles. (I note further that documents discovered by plaintiff in the Philippines, some of which are mentioned in this court's opinion granting preliminary injunction, show evidence of New York activity on the part of the Marcoses, conducted personally and through agents, which after inquiry, might well satisfy Shaffer requirements.)

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As to *forum non conveniens,* although these defendants have made passing references to it, there has been no motion to dismiss on that basis. Such a motion generally turns on many issues of fact none of which have been explored or even considered. Furthermore, as noted in the court's opinion of June 26, 1986, this lawsuit, unlike *Pahlevi,* does not set out to explore and adjudicate allegation of wrongful conduct by President Marcos during his presidency. It seeks only the enforcement of Philippine decrees—an existing Philippine decree freezing various assets and asking foreign governments to cooperate in entering such freeze, and a future decree of confiscation. The factors that supported the finding of *forum non conveniens* in *Pahlevi* are largely absent here.

As to the appropriateness of piercing corporate veils, such questions depend on the facts and are obviously premature prior to discovery. And once again, no motion to dismiss has been made based on that theory.

Defendants have also argued that any acquisition of property by Marcos during his presidency is protected from U.S. court adjudication by the principles of *Banco De Espana* v. *Federal Reserve Bank,* 114, F.2d 438 (2nd Cir. 1940) and that any Philippine decree of confiscation will be unenforceable in U.S. courts under authority of *Republic of Iraq* v. *First National City Bank,* 353 F.2d 47 (2d Cir. 1965), *cert. denied,* 382 U.S. 1027 (1966). No motion to dismiss has been made on either ground. (Indeed, defendants have never moved to dismiss the action on any theory in the district court.) It is evident, furthermore, that if motions were made on either ground *at this stage of the proceeding,* they could not be sustained; the issue would be raised prematurely.

Banco de Espana ruled that a particular Spanish governmental decree affecting the ownership of property

would be upheld against challenge in the U.S. courts, based on the act of state doctrine. That case simply does not support the proposition that any and all acquisitions of property by a foreign president during his tenure, no matter how accomplished, must be accorded immunity in U.S. courts under the act of state doctrine. What is more, the *Banco de Espana* precedent is barely applicable to the defendants' proposition. The U.S. court is not being asked in this case, as it was there, to rule on the legitimacy of acquisition of property in the foreign country. It is being asked, as noted above, to give effect to Philippine governmental decrees affecting the Marcos's assets. If anything, the *Banco de Espana* precedent instructing U.S. courts to honor foreign governmental decrees altering ownership of property of foreign subjects, is more helpful to the plaintiff than to the defendants on the present state of the record.

As to *Iraq*, it is premature for defendants to contend it commands dismissal of the action. In *Iraq*, the Court of Appeals ruled that a particular foreign decree of confiscation was not entitled to recognition affecting property in the United States because it contravened "the law and policy of the United States." *Id.* at 52. Whether any future Philippine governmental action will contravene or comport with the "law and policy" of the United States cannot be judged at this time. As to the existing freeze decree promulgated by the Philippine government, no reason has been advanced why such a provisional stay preserving the *status quo* to allow time for investigation and considered action contravenes our law and policy.

Because no motion has been made in the district court seeking dismissal on any of the asserted grounds, no district court ruling has ever been made which is now on appeal. In addition, it appears (based on such sketchy

discussion as there has been of these contentions in the district court) that further information and discovery would be necessary to an adjudication of dismissal on any of those grounds. Defendants' contention that the action is likely to be terminated by the decision of the Court of Appeals, therefore, seems unlikely and gives insufficient reason for staying discovery.

Nor would a dissolution of the preliminary injunction by the Court of Appeals necessarily be a reason to terminate discovery (depending, of course, on the grounds). If such dissolution were based on a finding of insufficient showing by plaintiff, plaintiff would need further discovery to attempt to remedy the insufficiency. It is true that a dissolution of the preliminary injunction might, as a practical matter, moot the action, by permitting the defendants to transfer ownership of the buildings beyond the court's jurisdiction, or to draw out the equity in the buildings by taking mortgages. The possibility that defendants might take such action to defeat plaintiff's prospects of effective recovery is not a reason to stay discovery.

It is possible that the Court of Appeals may render a decision in a short time. It is equally possible that the Court may see no good reason to push this ruling ahead of others on its calendar, so that decision may be awaited for some time. I see no reason why plaintiff should be denied discovery while waiting for an appeal from a grant of temporary interim relief.

As reviewed in the opinion of May 2, 1986, defendants have effectively prevented plaintiffs from obtaining discovery by deposition. After brief testimony, Joseph Bernstein abruptly terminated his deposition, refusing to return until after a ruling on the motion to dissolve the TRO. Bernstein first had obtained plaintiff's consent to stay his deposition until after he had purged himself of

contempt by testifying before a committee of Congress. Then, with no justification and certainly without court approval, he walked out of his deposition. This court had directed three days before that the deposition of Bernstein proceed. Glockhurst Corporation similarly refused to produce a representative until after ruling on the defendants' motion to dissolve the TRO. The same is true with respect to the deposition of William Deyo and of other deposition testimony sought by plaintiff of the property-owning defendants.

No reasons of even colorable merit were given for such refusals. Nor were the refusals based on any authorization by the court. Although defendants stated initially that they would refuse to proceed until the court had ruled on their motions to dissolve the TRO, they failed to resume after the court had ruled on that motion. Furthermore, the refusal has continued in disregard of a court order of June 16, 1986, which allowed defendants time to submit papers in support of this motion but made clear that the court had never authorized any stay and that the making of the motions for stay should not be regarded as justifying a stay.

It is apparent that the defendants' refusal has been a united effort to obstruct plaintiff's efforts to obtain discovery. It should not be permitted to succeed.

I note further that the discovery which is at issue—the depositions of Joseph Bernstein and other representatives of the property-holding companies—relates primarily to questions of particular pertinence to a New York action, the revelation of ownership of the New York properties. Such discovery relates only secondarily, or not at all, to issues of whether President Marcos obtained property of the Philippines by wrongdoing. Thus, to the extent that rules like *forum non conveniens* and the *act of state doc-*

trine may pose obstacles to certain types of inquiry by a U.S. court, those are not the inquiries to which these depositions relate. Identification of the ownership of the New York properties is a particularly appropriate issue for exploration in a New York court.

The defendants' motions to stay discovery are denied. The Bernstein deposition is directed to be resumed forthwith and, similarly thereafter, the depositions of the other property-owning companies. Should the depositions go beyond reasonable limits, it will be up to the defendants to seek a protective order confirming the scope.

II

Defendant Canadian Land Company applies for authorization to draw down on a long-standing loan agreement with Security Pacific Mortgage and Real Estate Services Inc. to pay for services performed and materials provided in a program of improvement of the Herald Center building. Plaintiff opposes the application, contending that allowance of such further encumbrance of the property "may be detrimental to plaintiff's interests." As in prior instances when similar disputes have arisen, plaintiff has failed to substantiate the claim. A draw down on the loan facility, first of all, does not increase the building's debt. The incremental debt was already incurred by the contractors' deliveries of materials and services to the building. The draw down to pay the contractors merely changes the identity of the creditor from materialmen and contractors to a financial institution. Furthermore, since the building has benefitted from these improvements, presumably increasing its value, no diminution of equity results from the incurrence of the debt. There is no reason why the contractors should not be paid by the long-standing loan facilities put in place by the owners to finance the

program of improvements. Plaintiff argues once again that such loans could be a fraudulent device for converting the equity into cash to be hidden away by the owner in foreign banks. Such an argument presupposes that the bills rendered are fraudulent and do not in fact represent the services and materials billed for. As before, however, plaintiff has offered no shred of substantiation for this allegation.[1] The loan agreements provide that the banks will not make payment without independent certification of the performance of the work billed for. The Bank's satisfaction and willingness to make payment offers plaintiff considerable protection, as the bank would expose itself to liability if it paid for unsubstantiated services.

Furthermore, it has been a justification, first for the TRO, and subsequently for the preliminary injunction, that it should interfere minimally with the defendants' beneficial operation of the buildings. The court's temporary order seeks only to preserve plaintiff's eventual ability to secure an effective remedy if plaintiff wins judgment. Failure to make prompt payment to contractors would result in liens, work stoppage and inability of the building managers to procure necessary services. Plaintiff's opposition to such applications, if made without factual basis, risks to interfere unreasonably with the operation of the buildings pending final adjudication.

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[1] Plaintiff contends it cannot assure itself of the *bona fides* of the payments without discovery. Although plaintiff has been denied depositions, it has had access to the documentation of the buildings. Plaintiff contends that without either cooperation of the defendants or depositions, it is unable to sort out and understand the documentation to be assured of the *bona fides* of these charges. This provides additional reason why depositions should go forward.

Appendix D—Opinion and Order of United States District Court Dated July 7, 1986

Accordingly, defendant's application is approved. The order defendant has submitted will be entered.

Dated: New York, N.Y.
July 7, 1986

So Ordered:

/s/ Pierre N. Leval
Pierre N. Leval, U.S.D.J.

APPENDIX E

Fed. R. Civ. P. 64

Rule 64. Seizure of Person or Property

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

Appendix E—Art. 62 N.Y. Civil Practice Law and Rules §§ 6201, 6212 and 6223 (McKinney)

Art. 62 N.Y. Civil Practice Law and Rules §§ 6201, 6212 and 6223 (McKinney)

§ 6201. Grounds for attachment

An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:

1. the defendant is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in the state; or

2. the defendant resides or is domiciled in the state and cannot be personally served despite diligent efforts to do so; or

3. the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts; or

4. the cause of action is based on a judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state, or on a judgment which qualifies for recognition under the provisions of article 53.

L.1962, c. 308; amended L.1970, c. 980, § 1; L.1977, c. 860, § 1.

Rule 6212. Motion papers; undertaking; filing; demand; damages

(a) Affidavit; other papers. On a motion for an order of attachment, or for an order to confirm an order of at-

tachment, the plaintiff shall show, by affidavit and such other written evidence as may be submitted, that there is a cause of action, that it is probable that the plaintiff will succeed on the merits, that one or more grounds for attachment provided in section 6201 exist, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff.

(b) Undertaking. On a motion for an order of attachment, the plaintiff shall give an undertaking, in a total amount fixed by the court, but not less than five hundred dollars, a specified part thereof conditioned that the plaintiff shall pay to the defendant all costs and damages, including reasonable attorney's fees, which may be sustained by reason of the attachment if the defendant recovers judgment or if it is finally decided that the plaintiff was not entitled to an attachment of the defendant's property, and the balance conditioned that the plaintiff shall pay to he sheriff all of his allowable fees. The attorney for the plaintiff shall not be liable to the sheriff for such fees. The surety on the undertaking shall not be discharged except upon notice to the sheriff.

(c) Filing. Within ten days after the granting of an order of attachment, the plaintiff shall file it and the affidavit and other papers upon which it was based and the summons and complaint in the action. Unless the time for filing has been extended, the order shall be invalid if not so filed, except that a person upon whom it is served shall not be liable for acting upon it as if it were valid without knowledge of the invalidity.

(d) Demand for papers. At any time after property has been levied upon, the defendant may serve upon the plaintiff a written demand that the papers upon which the order of attachment was granted and the levy made be served upon him. Not more than one day after service of the

demand, the plaintiff shall cause the papers demanded to be served at the address specified in the demand. A demand under this subdivision shall not of itself constitute an appearance in the action.

(e) Damages. The plaintiff shall be liable to the defendant for all costs and damages, including reasonable attorney's fees, which may be sustained by reason of the attachment if the defendant recovers judgment, or if it is finally decided that the plaintiff was not entitled to an attachment of the defendant's property. Plaintiff's liability shall not be limited by the amount of the undertaking.

L.1962, c. 308; amended L.1977, c. 15, § 1; L.1977, c. 860, § 5.

§ 6223. Vacating or modifying attachment

(a) Motion to vacate or modify. Prior to the application of property or debt to the satisfaction of a judgment, the defendant, the garnishee or any person having an interest in the property or debt may move, on notice to each party and the sheriff, for an order vacating or modifying the order of attachment. Upon the motion, the court may give the plaintiff a reasonable opportunity to correct any defect. If, after the defendant has appeared in the action, the court determines that the attachment is unnecessary to the security of the plaintiff, it shall vacate the order of attachment. Such a motion shall not of itself constitute an appearance in the action.

(b) Burden of proof. Upon a motion to vacate or modify an order of attachment the plaintiff shall have the burden of establishing the grounds for the attachment, the need for continuing the levy and the probability that he will succeed on the merits.

L.1962, c. 308; amended L.1977, c. 860, § 10.